Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that, notwithstanding the comprehensive grant of bankruptcy jurisdiction conferred by 28 U.S.C. § 1334, the district and bankruptcy courts lack jurisdiction to enforce the provisions of the Bankruptcy Code against a federal agency merely because, absent bankruptcy, review of the agency's actions may be subject to the exclusive jurisdiction of another court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the court of appeals were NextWave Personal Communications Inc. ("NPCI"), NextWave Partners Inc. ("NPI"), NextWave Power Partners Inc. ("NPPI"), NextWave Wireless Inc. ("NWI"), NextWave Telecom Inc. ("NTI"), and the Federal Communications Commission. NPCI, NPI, NPPI, and NWI are wholly owned subsidiaries of NTI. NTI is not a publicly traded company, and no publicly traded company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NextWave Personal Communications Inc., NextWave Partners Inc., NextWave Power Partners Inc., NextWave Wireless Inc., and NextWave Telecom Inc. (collectively "NextWave") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. In addition, because the decision below constitutes plain error in violation of the governing statute and numerous precedents of this and other Courts, NextWave respectfully suggests that the Court may wish to consider summary reversal.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 217 F.3d 125. The opinion of the bankruptcy court (App., *infra*, 30a-100a) is reported at 244 B.R. 253. The prior opinion of the court of appeals (App., *infra*, 101a-139a), upon which the court based the present mandamus decision, is reported at 200 F.3d 43, *pet. for cert. filed*, No. 99-1980 (June 9, 2000).

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. A timely petition for rehearing was denied on August 23, 2000. App., *infra*, 140a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Bankruptcy Code, the Hobbs Act, and the Federal Communications Act ("FCA") are reproduced at App., *infra*, 141a-148a.

STATEMENT OF THE CASE

This petition, like the related petition currently pending in *NextWave Personal Communications, Inc. v. Federal Communications Commission*, No. 99-1980, arises out of the Second Circuit's evisceration of what may be the most comprehensive jurisdictional grant in the United States Code: Congress's vesting of jurisdiction in the bankruptcy and district courts to hear *all* proceedings arising under the Bankruptcy Code or related to a bankruptcy case, "*[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.*" 28 U.S.C. § 1334(b) (emphasis added); *see also* 28 U.S.C. § 157. The decision below holds that bankruptcy and district courts lack jurisdiction to apply core provisions of the Bankruptcy Code whenever an agency action that adversely affects a bankruptcy debtor's interests is reviewable in another court pursuant to an exclusive jurisdiction provision. Notwithstanding the unambiguous and sweeping language of Section 1334(b) and related jurisdictional provisions, the court of appeals reasoned that "[e]xclusive jurisdiction to review the [agency's] regulatory action lies in the courts of appeals" by virtue of the exclusive jurisdictional provisions of 28 U.S.C. § 2342 and 47 U.S.C. § 402. App, *infra*, 25a.

The court of appeals' conclusion is flatly contradicted by the plain language of Section 1334(b), which confers jurisdiction on the bankruptcy courts "notwithstanding" any statutes purporting to confer exclusive jurisdiction on another court. Other provisions of the Bankruptcy Code confirm the self-evident proposition that Section 1334(b) means what it says, and vests bankruptcy courts with jurisdiction to enforce the Bankruptcy Code in the administration of a bankruptcy case even when the Code's provisions affect or restrain actions sought to be taken by federal agencies. *See, e.g.*, 11 U.S.C. § 106(a)(2) ("The [bankruptcy] court may hear and determine *any issue* arising with respect to the

application of [the Code provisions at issue here] *to governmental units*.") (emphasis added).

In addition, the court of appeals' nullification of these essential bankruptcy jurisdictional statutes conflicts with decisions of this Court and of other courts of appeals. Indeed, *every* other appellate court that has addressed the issue has given full effect to the Bankruptcy Code's governing jurisdictional statutes, and has recognized correctly that these statutes confer bankruptcy jurisdiction even over proceedings that would normally be subject to the exclusive jurisdiction of another court. *See, e.g., Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987).

The decision below threatens the jurisdictional and substantive foundations underlying Congress's carefully crafted bankruptcy scheme. The Second Circuit's jurisdictional ruling prevented the bankruptcy court from enforcing core provisions of the Bankruptcy Code—Sections 525, 1123 and 362—against the FCC to stop the removal of valuable assets (spectrum licenses) from NextWave's bankruptcy estate. The bankruptcy system depends upon the ability of bankruptcy courts to marshal each debtor's assets and prevent creditors, including government agencies, from engaging in conduct that removes value from the bankruptcy estate or prevents the orderly administration of the debtor's affairs. If the bankruptcy and district courts lack jurisdiction to enforce the provisions of the Bankruptcy Code against the FCC here, it follows that a wide array of federal agencies must enjoy the same broad immunity. Because federal agencies appear frequently as creditors in bankruptcy cases, immunizing such agencies from the Code's requirements sets a precedent that is destined to render chaotic the administration of bankruptcy cases nationwide.

Unless overturned by this Court, therefore, the decision below will engender widespread confusion regard-

ing the hitherto unquestioned scope of bankruptcy jurisdiction, and will eliminate the ability of bankruptcy courts to apply the provisions of the Code in the everyday administration of a bankruptcy case when a federal agency is involved in the proceedings. Further, the court of appeals' decision will create a jurisdictional Catch 22 for debtors seeking the protection of the bankruptcy laws to reorganize their businesses, because it authorizes federal agencies to take adverse action against a debtor based solely on the debtor's compliance with the provisions of the federal bankruptcy laws. This Court should summarily reverse the decision of the court of appeals, or in the alternative should grant plenary review to eliminate the conflict that now exists on this important issue of federal court jurisdiction.

A. Factual Background

Following the 1993 amendments to the Federal Communications Act, the FCC auctioned "blocks" of the electromagnetic spectrum suitable for personal communication services ("PCS"). The C and F Blocks were reserved for "designated entities" such as small businesses. NextWave, a newly formed small business, was the high bidder for 63 licenses at the C-Block auctions, which ended in May and July of 1996. NextWave's high bids totaled $4.7 billion. App., *infra*, 33a. In compliance with FCC regulations, NextWave placed deposits with the FCC equaling 10 percent of its total bid amount (approximately $474 million).

The FCC, however, did not approve NextWave's license applications until January 1997, and did not actually issue the licenses to NextWave until February 1997. App., *infra*, 33a. When the licenses were finally issued, NextWave executed promissory notes to the FCC to pay the balance of the $4.7 billion purchase price, with in-

terest, over a ten-year term. *See* 47 C.F.R. §§ 1.2110(e), 24.711(b) (1996).[1]

In the months between NextWave's successful bid for its licenses and the actual issuance of the licenses in February 1997, the FCC held auctions for nearly *1500 additional* PCS licenses. 99-1980 Pet. App. 71a. The prices for these licenses were dramatically lower than the prices for the C-Block licenses, averaging less than 25 percent of the C-Block bids. App., *infra*, 33a.

Because of this precipitous drop in the market value of the licenses, NextWave was unable to obtain the financing necessary to make its installment payments and build out its PCS network, and on June 8, 1998—like a significant number of other C-Block license holders—NextWave commenced a bankruptcy proceeding under Chapter 11 of the Bankruptcy Code. App., *infra*, 33a-34a. As contemplated by the Bankruptcy Code, NextWave's bankruptcy filing was intended to provide it with breathing room sufficient to preserve its assets and permit it to reorganize its business under the protection of the automatic stay.

By the time of the bankruptcy filing, NextWave had expended not only the $474 million already paid to the FCC, but also approximately $100 million on the build-out and pre-activation phase of its network development plan. It owed thousands of creditors in excess of $400 million. Nevertheless, NextWave had complied with every regulatory requirement imposed by the FCC, and was not delinquent on any payment to the FCC.

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[1] One of NextWave's affiliates, NPPI, was high bidder for certain F-Block licenses, which were issued to NextWave in the spring of 1997. The bankruptcy court litigation with the FCC initially involved only the debt related to the C-Block licenses, until the FCC's January 12 Public Notice purported to cancel and announce re-auctions for both NextWave's C- and F-Block licenses.

B. The Original Bankruptcy Litigation

Upon the filing of a petition for protection under the bankruptcy laws, NextWave assumed the statutory role of debtor-in-possession, charged with the responsibility to ensure that creditor claims are valid and represent amounts for which the company received equivalent value. Concurrent with the filing of its bankruptcy petition, NextWave (following the precedent set by other insolvent C-block licensees) commenced a fraudulent conveyance action against the FCC to challenge the FCC's claim. Pursuant to Section 544 of the Bankruptcy Code, NextWave sought to have the amount of its debt to the FCC adjusted to the value of the licenses at the time they were granted and the debt incurred. *See* 11 U.S.C. § 544(b)(1). After trial, the bankruptcy court ruled for NextWave, reducing NextWave's indebtedness under the notes to $1.023 billion, the fair market value of the licenses on the date the licenses were granted. 99-1980 Pet. App. 112a, 117a-134a. The district court affirmed. *Id.* at 40a-56a.

The Second Circuit reversed. App., *infra*, 101a-139a. Contrary to the broad grant of bankruptcy jurisdiction conferred by 28 U.S.C. § 1334, the court of appeals held that bankruptcy and district courts lack jurisdiction to adjudicate bankruptcy-related actions against the FCC that implicate the FCC's "regulatory" power. *Id.* at 13a, 15a. The court reasoned that NextWave's obligation to pay the full bid amount for the licenses was "regulatory" in nature, and that 28 U.S.C. § 2342 and 47 U.S.C. § 402 grant "exclusive" jurisdiction over FCC regulatory actions to the court of appeals. App., *infra*, 121a ("jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals").

C. The Automatic Stay Litigation

As a result of NextWave's extensive financing efforts, aided substantially by the recovery of market con-

ditions, NextWave was eventually able to raise sufficient capital to pay in full its debt to the FCC and all of its other creditors, emerge from bankruptcy, and proceed expeditiously to offer its PCS network to consumers. NextWave is thus poised to fulfill the goals Congress sought to achieve in enacting the Bankruptcy Code and in mandating that portions of the spectrum be auctioned to small and startup businesses.

Accordingly, on December 16, 1999, NextWave filed a modified plan of reorganization providing, *inter alia*, that the FCC would be paid in full, including all past-due amounts, penalties, and interest. *See* Pet C.A. App. 5, 13, 271.[2] On January 11, 2000, in an effort to avoid further litigation, NextWave submitted an enhanced proposal to the FCC, offering to satisfy all present *and future* obligations to the FCC through a lump sum cash payment in excess of $4.3 billion upon confirmation of the Plan. App., *infra*, 32a; Pet. C.A. App. 668-669.[3]

Notwithstanding NextWave's ability and willingness to satisfy its full bid price obligations, on January 12, 2000—only one day after NextWave's lump sum offer, and a mere nine days before scheduled plan confirmation—the FCC objected to confirmation of NextWave's reorganization plan. The FCC asserted *for the first time* that NextWave's licenses had "automatically canceled" at an unspecified date more than a year before—a full

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[2] "Pet. C.A. App." refers to the appendix of record materials filed by NextWave in the mandamus proceeding in the court of appeals.

[3] The $4.3 billion payment, together with the $505 million of license payments already made by NextWave, includes interest-on-interest and would total in excess of $4.8 billion, making it the largest payment ever made by a company to the United States government for any spectrum auction held to date.

eleven months prior to the Second Circuit's original jurisdiction decision—ostensibly because NextWave had not made timely interest payments during the pendency of its bankruptcy case. App., *infra*, 31a-32a; Pet. C.A. App. 700. The FCC also issued that same day a Public Notice, purportedly scheduling an auction of NextWave's licenses for July 26, 2000. App., *infra*, 42a-43a.[4]

Applicable bankruptcy law, however, expressly prohibits the FCC from revoking NextWave's licenses on this basis, and likewise permits NextWave to cure and nullify the effects of any payment default. *See* 11 U.S.C. §§ 525(a), 1123(a)(5)(A), 1123(a)(5)(G), & 362(a). NextWave immediately sought relief in the Bankruptcy Court from the FCC's blatant violation of those provisions of the Bankruptcy Code. On January 31, 2000, after briefing and an extended hearing, the Bankruptcy Court held that the FCC's attempted cancellation of the licenses was void on several independent grounds. App., *infra*, 30a-100a.

First, the court held that the purported cancellation was void because it violated the automatic stay, 11 U.S.C. § 362(a), which generally prevents creditors and others from taking steps to enforce liens or otherwise deprive debtors of property that may be essential to a successful bankruptcy reorganization. App., *infra*, 50a-54a. Second, the court held that the FCC's attempt to seize the licenses for non-payment of interest installments violated the right to "cure," which permits debtors who default on their contractual obligations during bankruptcy to cure any such default in their plan of reorganization and thereby nullify the consequences of the

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[4] The FCC has since amended that date, and now proposes to reauction NextWave's C- and F-Block licenses on December 12, 2000. FCC Public Notice, DA 00-2038 (Sept. 6, 2000).

default. *Id.* at 54a-56a, citing 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A). The court explained that "even if there was a default in the 'timely' payment of installments under the Notes, the Bankruptcy Code explicitly provides for the right to cure the default and reinstate the obligation." App., *infra*, 54a.

Third, the Bankruptcy Court held that no default had in fact occurred. App., *infra*, 68a-72a. The court explained that "[a]ny notion of a legally cognizable 'default' presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first instance," but that by virtue of the Bankruptcy Code's general prohibition against payments of this kind "the debtors could not have made post-petition payments on account of this pre-petition claim" without express judicial authorization. *Id.* at 68a, citing 11 U.S.C. §§ 102(1), 363.

Fourth, the court held that the FCC's attempted cancellation was barred by the doctrines of estoppel and waiver. App., *infra*, 72a-82a. The court found numerous explicit and public representations by the FCC on which NextWave, its creditors and investors had relied: (1) that the automatic stay protected NextWave from any obligation to make payments on the licenses pending reorganization; (2) that the FCC was subject to the automatic stay; (3) that NextWave continued to hold the licenses long after the purported "automatic" cancellation date; and (4) that automatic cancellation had not occurred and could not occur absent a judicial order lifting the automatic stay. *Id.* at 72a-78a. The court found that "[a]ll parties in interest, *including the FCC*, conducted themselves in a way which clearly demonstrated reliance upon these assumptions." *Id.* at 76a (emphasis in original). The court further found that the FCC waived any timely-payment requirement. *Id.* at 80a-82a.

Based on its resolution of these issues, the bankruptcy court found it unnecessary to resolve

NextWave's claim that the FCC's attempted cancellation of the licenses for non-payment of interest installments was expressly precluded by 11 U.S.C. § 525(a). App., *infra*, 57a-61a. Section 525(a) provides that "a governmental unit may not . . . revoke . . . a license . . . because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title."

Following the bankruptcy court's ruling, the FCC petitioned the court of appeals for a writ of mandamus seeking a determination that the bankruptcy court's decision violated the mandate of the Second Circuit's December 22, 1999 decision, and that the bankruptcy court was without jurisdiction to apply or enforce the provisions of the Bankruptcy Code permitting NextWave to retain and pay for its licenses. On May 25, 2000, the Second Circuit granted the FCC's petition. App., *infra*, 1a-29a.

The court of appeals held that its prior ruling on the appeal in this case (App., *infra*, 101a-139a; *see* Pet. for Cert. in No. 99-1980) prevented the bankruptcy court from exercising jurisdiction to enforce the Bankruptcy Code with respect to *any* regulatory action of the FCC. "The bankruptcy court lacked jurisdiction to declare the Public Notice [canceling and announcing the re-auction of NextWave's licenses] null and void on *any* ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." App., *infra*, 23a (emphasis added). Once again, the court of appeals based its jurisdictional holding entirely on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, which it concluded grant the federal courts of appeals exclusive jurisdiction to review the FCC's actions. App., *infra*, 25a ("Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals."). Thus, the Second Circuit held that "[t]he jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise." *Id.* The court of appeals further declared

that it had "no doubt that the Public Notice . . . is an appealable decision or order of the FCC," but held that "its regulatory nature requires that it be appealed in the court of appeals." *Id.* at 28a n.10.

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Conflicts With The Governing Congressional Enactment And With This Court's Precedents

A. The Court Of Appeals' Rejection Of Bankruptcy Jurisdiction Is Irreconcilable With The Plain Language Of 28 U.S.C. § 1334 And The Bankruptcy Code

By the express terms of 28 U.S.C. § 1334, Congress granted the federal district and bankruptcy courts jurisdiction over all bankruptcy-related proceedings.[5] Eliminating any possible doubt about the breadth of this jurisdictional grant, Congress also mandated that this grant of bankruptcy jurisdiction overrides all otherwise applicable exclusive-jurisdiction provisions set forth in any other statutes:

> *Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have original but not exclusive jurisdiction of *all* civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b) (emphases added); *see also* H.R. REP. NO. 595, 95th Cong., 2d Sess. 445 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6400 (Section 1334(b) "is the broadest grant of jurisdiction to dispose

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[5] Section 1334 refers to the federal district courts, but the bankruptcy courts are generally entitled to exercise this jurisdiction as well pursuant to 28 U.S.C. § 157(a) & (b).

of proceedings that arise in bankruptcy cases or under the bankruptcy code").

Despite Congress's unambiguous mandate that bankruptcy jurisdiction under Section 1334(b) should override other exclusive-jurisdiction statutes, the court below held that the bankruptcy court lacked jurisdiction to apply the Bankruptcy Code's "automatic stay" and "cure" provisions—core bankruptcy principles that lie at the heart of the Code's "fresh start" policies—to the FCC because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals." App., *infra*, 25a. In rejecting bankruptcy jurisdiction here, the Second Circuit relied on the very type of exclusive-jurisdiction statutes that Section 1334(b)'s "notwithstanding" clause expressly trumps. *See id.* at 25a-26a, citing 28 U.S.C. § 2342 (granting exclusive jurisdiction to courts of appeals to review final orders of the FCC), and 47 U.S.C. § 402(b) (granting exclusive jurisdiction to the District of Columbia Circuit to review certain FCC licensing orders). The court of appeals' error could not be more apparent: In blatant disregard of the unambiguous provisions of Section 1334(b), the court chose to enforce the exclusive jurisdiction provisions of other statutes that Section 1334(b) expressly renders inapplicable in the bankruptcy context.

Further confirming the egregiously wrong nature of the decision below, the Bankruptcy Code makes it perfectly clear that governmental entities like the FCC enjoy no exemption from bankruptcy jurisdiction. Far from immunizing federal agencies from the authority of bankruptcy courts to enforce the Code, Congress instead insisted that federal agencies must submit themselves to bankruptcy court adjudication of a wide array of issues arising under the Code. Pursuant to Section 106(a) of the Code, for example, the district and bankruptcy courts "may hear and determine *any issue* arising with respect to the application of . . . sections [362, 525, and 1141] to governmental units." 11 U.S.C. § 106(a) (em-

phasis added). The court of appeals' rejection of bankruptcy court jurisdiction over such claims nullifies this clear grant of bankruptcy court authority.[6]

Likewise, the decision below makes a mockery of Section 525(a) of the Code, a provision that expressly addresses and squarely prohibits the very type of government action at issue here. Section 525(a) commands that "a governmental unit may not . . . revoke . . . a license . . . because [the] debtor . . . has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a). The FCC, of course, did precisely what Section 525(a) forbids, revoking NextWave's licenses for non-payment of interest during NextWave's bankruptcy. The Second Circuit's rationale—that bankruptcy courts lack jurisdiction to affect "regulatory" decisions of federal agencies—would eviscerate Section 525(a) as a meaningful protection against federal agency license revocations. That result is wholly untenable, because Congress extended the prohibitions of Section 525(a) to all "governmental unit[s]," a category that includes any "department, agency, or instrumentality of the United States." 11 U.S.C. § 101(27).[7] For this rea-

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[6] The judgment below also conflicts with 28 U.S.C. § 157(b), which delegates to the bankruptcy judge jurisdiction over "matters concerning the administration of the estate," "confirmations of [reorganization] plans," and "other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship," and with 11 U.S.C. § 1123, which expressly authorizes bankruptcy courts to approve plans of reorganization that permit a Chapter 11 debtor to cure any default and retain its assets in exchange for the satisfaction of a debt.

[7] Similarly, the court of appeals' holding cannot be squared with the Code's automatic stay provisions, which plainly contemplate that agency attempts to revoke the licenses of debtors in bankruptcy would be barred by the automatic stay. *See* 11 U.S.C. § 362(a) (preventing credi-

son as well, the court of appeals' decision is plainly wrong.

The judgment below is also inconsistent with 28 U.S.C. § 1334(e), which provides that the district court has "exclusive jurisdiction of all of the . . . property of the estate," and with decisions of other courts of appeals holding or assuming that FCC licenses are property of the estate for bankruptcy purposes. *See In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7th Cir. 1993); *In re Atlantic Bus. & Community Dev. Corp.*, 994 F.2d 1069, 1075 (3d Cir. 1993). The court below did not expressly address whether FCC licenses are property of the estate for bankruptcy purposes, but the court's rejection of bankruptcy jurisdiction over FCC licenses is irreconcilable with those authorities.

B. The Judgment Below Directly Conflicts With This Court's Precedents

The court of appeals' rejection of bankruptcy jurisdiction in this case is squarely at odds with this Court's precedents. In *Board of Governors v. MCorp Fin., Inc.*, 502 U.S. 32 (1991), for example, this Court unequivocally declared that Section 1334(b), by its plain terms, "authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings *that would otherwise be subject to the exclusive jurisdiction of another court*." 502 U.S. at 41 (emphasis added). Moreover, this Court has also emphasized that "Congress intended to grant *comprehensive jurisdiction* to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters connected*

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tors, including governmental agencies, from pursuing most civil debt enforcement activities during a debtor's bankruptcy case); H.R. REP. NO. 95-595, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297 ("All proceedings are stayed, *including . . . license revocation*") (emphasis added).

with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citation omitted; emphases added). Indeed, as this Court noted in *Celotex*, the special importance of Chapter 11 proceedings reinforces the jurisdictional analysis, because bankruptcy jurisdiction in such cases "may extend more broadly" than in other contexts, and must encompass any proceeding that could affect the debtor's ability to formulate a feasible plan of reorganization. *See Celotex*, 514 U.S. at 310. By eviscerating the authority of bankruptcy courts to enforce the provisions of the Bankruptcy Code and adjudicate a large category of bankruptcy claims relating to the rights and obligations of debtors, the court of appeals violated the principles enumerated by this Court in *Celotex* and *MCorp*.

The decision below is also irreconcilable with this Court's case law governing the interpretation of federal statutes. This Court has held that "the use of . . . a 'notwithstanding' clause [such as that included in Section 1334(b)] clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of *any* other section." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). The Second Circuit's ruling, on the other hand—that despite the plain meaning of Section 1334(b)'s "notwithstanding" clause, the exclusive-jurisdiction provisions of the FCA and the Hobbs Act preclude bankruptcy-court review—is flatly inconsistent with this Court's construction of such clauses.[8]

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[8] The decision below also conflicts with the well-established principle that a claimant (including a governmental entity) that files a claim in a bankruptcy case submits to the jurisdiction of the bankruptcy court, and likewise to application of the bankruptcy laws. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990); *Katchen v. Landy*, 382 U.S. 323, 334-36 (1966); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-44, 852 (1986). It is

This Court has also recognized that bankruptcy courts have authority to apply the provisions of the Bankruptcy Code in bankruptcy cases to prevent governmental agencies from seizing or otherwise exercising control over the assets of bankrupt debtors. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (affirming bankruptcy court's enforcement of the Bankruptcy Code against the IRS and concluding that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector."). In this instance, the bankruptcy court did nothing more than exercise its ordinary, core jurisdiction to prevent the forfeiture of NextWave's licenses, and in doing so did nothing more than enforce what the Bankruptcy Code expressly directs.

II. The Second Circuit's Decision Creates A Square Circuit Conflict

The decision below also contradicts the decisions of every court of appeals that has considered whether Section 1334 confers bankruptcy-court jurisdiction over bankruptcy-related proceedings despite the existence of statutes purporting to grant exclusive jurisdiction to a different court. Contrary to the decision below, for example, the Federal Circuit in *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995), held that the district court in bankruptcy has concurrent jurisdiction over government contract disputes notwithstanding the provisions of the Tucker Act, which "purports to make the Court of Federal Claims the exclusive trial court for hearing" such claims. *Id.* at 1572-73 (citing 28 U.S.C. §§ 1346(a)(2), 1491(a)(2)). The court held that Section 1334(b) clearly overrides any competing exclusive-jurisdiction statute:

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undisputed that the FCC filed a proof of claim against NextWave in this bankruptcy case asserting a liability in excess of $4.7 billion.

> Congress . . . anticipated that there would be claims involving a bankrupt's estate that, by statute, were assigned exclusively to some court other than a district court. Congress, wishing to give the district court sitting in bankruptcy plenary authority over the bankrupt's estate and *all claims by or against it*, expressly provided that the district court would have concurrent jurisdiction over all claims, *even those which by statute were within the exclusive jurisdiction of other federal courts*.

Id. at 1573 (emphases added). The Federal Circuit thus concluded that "[t]here can be little doubt that, by statute, both the District Court, sitting in bankruptcy, and the Court of Federal Claims are empowered with subject matter jurisdiction over this . . . dispute." *Id.*

The Third Circuit has similarly held that Section 1334(b) provides bankruptcy and district courts with jurisdiction despite the existence of a conflicting statutory grant of exclusive jurisdiction to another court. *See Brock*, 829 F.2d at 385-86. Although 29 U.S.C. § 660(b) purported to grant to the courts of appeals "original and exclusive jurisdiction" to review the federal agency order at issue in that case, the Third Circuit explained that "section 1334(b) alters the effect of the jurisdictional grant of section 660(b) by expressly rendering it non-exclusive." *Id.* at 385. Thus, contrary to the Second Circuit's approach, the *Brock* court held that, notwithstanding any other statutory grant of exclusive jurisdiction to a different court, "the effect of 28 U.S.C. § 1334(b) is to grant the district court overseeing the bankruptcy concurrent original jurisdiction." *Id.*; *see also In re University Med. Ctr.*, 973 F.2d 1065, 1072, 1073-74 (3d Cir. 1992).

The Ninth Circuit has reached this same conclusion, declaring that Section 1334(b) demonstrates Congress's clear intent "'to bring all bankruptcy-related litigation within the umbrella of the district court, . . . *irrespective of congressional statements to the contrary in the con-*

text of other specialized litigation.'" *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1992) (citation omitted; emphasis added). Indeed, the Ninth Circuit has recently reaffirmed that "the purpose of [Section 1334(b)] is . . . to allow district courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions *in which jurisdiction has been vested in other courts.*" *In re Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000) (emphasis added).[9]

In a matter strikingly similar to the instant case, the Fifth Circuit has allowed a bankruptcy court to exercise jurisdiction over the FCC. In *United States v. GWI PCS 1, Inc.*, 245 B.R. 59 (N.D. Tex. 1999) the district court affirmed the bankruptcy court's ruling in favor of C-Block license holders that brought a fraudulent conveyance action against the FCC, concluding that the license holders were permitted to retain the licenses, while avoiding more than $900 million of the original $1.06 billion bid as a fraudulent conveyance. *Id.* at 60-61. In direct contrast to the Second Circuit's rejection of bankruptcy-court jurisdiction, the Fifth Circuit declined even to grant the FCC a stay of plan confirmation pending disposition of the FCC's appeals. *In re United*

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[9] Lower federal courts have reached the same conclusion. *See, e.g., In re Kansas Personal Communications Services, Ltd.*, 252 B.R. 179, 2000 WL 1199798 (Bankr. D.K. Aug. 16, 2000) (expressly rejecting the jurisdictional holding of the Second Circuit in this case as "fundamentally wrong," "unprecedented," and "without merit"); *In re Horizon Air, Inc.*, 156 B.R. 369, 377-78 (N.D.N.Y. 1993) (district court has jurisdiction over challenge to FAA's order revoking operating certificate); *In re Bulldog Trucking, Inc.*, 150 B.R. 912, 915-16 (W.D.N.C. 1992) (Section 1334(b) grants concurrent jurisdiction despite Section 2342); *In re Transcon Lines*, 147 B.R. 770, 774 (Bankr. C.D. Cal. 1992) (same).

States, No. 98-11123 (5th Cir. Oct. 7, 1998); *see* 245 B.R. at 61.[10]

Thus, unlike the Second Circuit below, the Third, Fifth, Ninth, and Federal Circuits have given full effect to the broad grant of bankruptcy jurisdiction set forth in 28 U.S.C. § 1334, and have recognized correctly that Section 1334(b) confers bankruptcy jurisdiction even over proceedings that might otherwise be subject to the exclusive jurisdiction of another court. This Court's review is warranted to resolve the stark conflict that now exists among the circuits over whether otherwise applicable exclusive-jurisdiction provisions oust bankruptcy and district courts of their Section 1334 jurisdiction.

III. The Question Of Federal Bankruptcy Jurisdiction Presented In This Case Is Important And Recurring, And Merits This Court's Review

By permitting otherwise applicable exclusive-jurisdiction provisions to trump the bankruptcy court's Section 1334 jurisdiction, the decision below effectively nullifies Congress's express command and creates an amorphous and infinitely elastic "regulatory" exception to bankruptcy-court jurisdiction. Under the Second Circuit's approach, every federal agency whose decisions are reviewable pursuant to an exclusive-jurisdiction provision could characterize a bankruptcy-related proceeding as interfering with its "regulatory" functions, thereby obtaining immunity from bankruptcy-court jurisdiction. The result would be regular evasions of Congress's clear mandate that district and bankruptcy courts hearing bankruptcy cases must possess authority to address *all* aspects of the debtor's rights and respon-

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[10] The FCC's subsequent appeals in *GWI* were rejected by the district court. 245 B.R. at 64. An appeal of the district court's decision is currently pending in the Fifth Circuit. *FCC v. GWI PCS 1, Inc.*, No. 99-11294 (5th Cir. oral arg. Feb. 3, 2000).

sibilities in order to ensure a complete and efficient resolution of the bankruptcy.[11]

Congress has enacted numerous provisions that purport to vest exclusive jurisdiction in courts other than the district courts. For example, the Second Circuit based its decision in part on an exclusive-jurisdiction provision of the Hobbs Act, 28 U.S.C. § 2342(1), which grants exclusive jurisdiction over FCC final orders to the courts of appeals. That same act, however, also grants to the courts of appeals exclusive jurisdiction over final orders, rules, regulations, or actions of six other departments or agencies. *See* 28 U.S.C. §§ 2342(2) (Department of Agriculture), 2342(3)(A) (Department of Transportation), 2342(3)(B) (Federal Maritime Commission), 2342(4) (Atomic Energy Commission); 2342(5) (Surface Transportation Board), 2342(6) (Department of Housing and Urban Development), and 2342(7) (Department of Transportation).

The Second Circuit also relied in part on the exclusive jurisdiction of the D.C. Circuit to review FCC licensing orders under the FCA, 47 U.S.C. § 402(b). The D.C. Circuit has been granted exclusive jurisdiction to review decisions of several other administrative agencies as well, including the Federal Election Commission (*see* 2 U.S.C. § 437g(a)(8)(A)) and the Environmental Protection Agency (*see, e.g.*, Safe Drinking Water Act, 42 U.S.C. § 300j-7(a); Clean Air Act, 42 U.S.C. § 7607(b); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a)). In addition, several other courts, including the Court of

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[11] The impact of the Second Circuit's revolutionary jurisdictional holding is already being felt in other pending bankruptcy cases. In *In re Personal Communications Network, Inc.*, 249 B.R. 233, 236-37 (Bankr. E.D.N.Y. 2000), the court relied on the Second Circuit's construction in holding that it lacked jurisdiction over the debtor's FCC licenses because the FCC had purported to cancel them.

Federal Claims, the Federal Circuit, the Court of International Trade, and the Court of Veterans Appeals, also possess exclusive jurisdiction over specific types of claims. *See, e.g.*, 28 U.S.C. § 1491 (granting the Court of Federal Claims exclusive jurisdiction over certain claims against government agencies); 28 U.S.C. § 1295(a)(6)-(14) (granting the Federal Circuit exclusive jurisdiction to review certain determinations by the Secretary of Commerce, the Merit Systems Protection Board, agency boards of contract appeals, and various other matters); 28 U.S.C. § 1581 (providing the Court of International Trade with exclusive jurisdiction over the review of certain administrative decisions involving tariffs); 38 U.S.C. § 7252 (providing the Court of Veterans Appeals with exclusive jurisdiction to review decisions by the Board of Veterans' Appeals); 49 U.S.C. § 46110(a) (granting the courts of appeals exclusive jurisdiction over final action by the Federal Aviation Administration).

There is thus no principle that would limit the impact of the Second Circuit's decision to the FCC. Rather, under the rule adopted below, whenever an agency whose decisions are reviewable under an exclusive-jurisdiction provision characterizes a bankruptcy claim or proceeding as relating to its "regulatory" function, the agency would be immunized from bankruptcy-court jurisdiction. As a result, resolution of the estate's claims would be fractured and dispersed over multiple courts, despite Congress's clear intent that the bankruptcy courts have centralized control over the resolution of debtors' estates, and that the Bankruptcy Code apply to agencies when dealing with debtors in bankruptcy. Such a result would frustrate the paramount purposes of the Bankruptcy Code and would dramatically alter the careful and reticulated balance that Congress has struck between creditors' and debtors' rights in the Code. Bankruptcy courts would be powerless to apply the provisions of the Bankruptcy Code to prevent federal agencies from summarily seizing assets from a bankruptcy

estate. The consequences would be seriously detrimental, not only for debtors attempting reorganization, but also for countless creditors, investors, employees, and other innocent third parties who depend upon the equitable and efficient resolution of bankruptcies.

Congress, in fact, recognized the overarching importance of vesting bankruptcy courts with the broadest possible jurisdiction, and the Second Circuit's wholesale rejection of Congress's policy determination presents a further compelling justification for this Court's review. As the House Report on Section 1334 explained, that section's "comprehensive" grant of bankruptcy-court jurisdiction was "a significant change from current law," and was necessary to "greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs." H.R. REP. NO. 595 at 46, 445, *reprinted in* 1978 U.S.C.C.A.N. at 6007, 6400. The Senate Report further explained, "[t]his broad grant of jurisdiction will enable the bankruptcy courts . . . to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code . . . [including] [a]ctions that formerly had to be tried in [other courts] at great cost and delay to the estate." S. REP. NO. 989, 95th Cong., 2d Sess. 153 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5939.

This Court, moreover, has recognized that bankruptcy-court jurisdiction, particularly in Chapter 11 cases, serves the important purposes of "provid[ing] for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 389 (1993) (citation omitted). As this Court has also explained, however, those important purposes can be achieved *only* by honoring the Bankruptcy Code's carefully calibrated network of compromises, and thus courts must be especially careful not to upset the balance struck by Congress: "[B]y adding through judicial

fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 331 (1999). The decision below, by creating a broad exception to bankruptcy courts' Section 1334 jurisdiction, achieves precisely that forbidden result.

The Second Circuit's holding that the FCC's purported "regulatory" functions are completely outside the purview of bankruptcy, for example, not only frustrates the purposes of Section 1334(b), but also contradicts several other provisions of the Bankruptcy Code that reveal Congress's intent that regulatory agencies be subject to the bankruptcy process rather than be exempted from it *ab initio*. As discussed in Point I above, numerous provisions of the Code demonstrate that Congress expected bankruptcy courts to have jurisdiction to review regulatory actions affecting bankruptcy proceedings, specifically including agency efforts to revoke licenses held by debtors in bankruptcy. *See* 11 U.S.C. § 525(a); *see also* 11 U.S.C. §§ 101(27), 106, 362; *see generally* pp. 12-13, *supra*. The decision below, by depriving bankruptcy courts of authority to enforce provisions of the Bankruptcy Code expressly aimed at such agency action, frustrates Congress's evidence purposes in enacting the Code.

The Code's general applicability to federal regulatory agencies is also demonstrated by the presence of specific *exceptions* for such agencies—including exceptions to the automatic stay of 11 U.S.C. § 362, a bedrock provision of the Code. Congress has expressly exempted certain limited exercises of "police or regulatory power" from some aspects of the automatic stay, *see* 11 U.S.C. § 362(b)(4), and has created other, more specific exceptions for certain acts by individual agencies. *See*,

e.g., *id.* § 362(b)(8) (Secretary of Housing and Urban Development); *id.* § 362(b)(12) (Secretary of Transportation); *id.* § 362(b)(13) (Secretary of Commerce); *id.* § 362(b)(16) (Secretary of Education); *see also id.* § 525(a) (excepting some acts of the Department of Agriculture from the license-cancellation ban); *id.* §§ 555, 556, 761 (creating different bankruptcy rules for liquidating commodity brokers, securities contracts, commodities contracts, and forward contracts). No such exceptions exist for the FCC. Nor, of course, does any bankruptcy provision broadly exempt *any* agency from the Bankruptcy Code, or from bankruptcy courts' power to apply the Code.

As the clear and carefully limited exceptions contained in the Bankruptcy Code demonstrate, if Congress had intended to alter the fundamental purpose and balance of the Code by creating a broad exception to the jurisdictional provisions for certain federal agencies acting in their "regulatory capacity" (App., *infra*, 16a, 20a), it would have done so explicitly. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). The sweeping immunity for federal agencies created by the court below thwarts Congress's obvious desire to vest bankruptcy courts with the widest possible jurisdiction over all bankruptcy-related matters. The proposition that a bankruptcy court is prevented from enforcing the express provisions of the Bankruptcy Code against a federal agency in the administration of a bankruptcy case is simply inconceivable. It would engender widespread confusion regarding the hitherto unquestioned scope of bankruptcy jurisdiction, and would render chaotic the administration of bankruptcy cases nationwide.

The Second Circuit's decision also creates a jurisdictional Catch 22 for debtors seeking protection under the bankruptcy laws, because it effectively authorizes federal agencies to take action against a debtor based solely on the debtor's compliance with the federal bankruptcy laws. As a general rule, the Bankruptcy Code prohibits

debtors in chapter 11 cases from making payments to creditors, including governmental agencies, outside the terms of a confirmed chapter 11 plan.[12] NextWave's compliance with this rule, which is designed to ensure fair treatment of all creditors, formed the basis for the FCC's purported cancellation of NextWave's licenses. The court of appeals nonetheless divested the bankruptcy and district courts of jurisdiction to enforce the Bankruptcy Code's clear prohibitions against such conduct—which include the automatic stay, the right to "cure" defaults, and the prohibition against license cancellation for non-payment of debts. 11 U.S.C. §§ 362, 525, 1123, 1124. Thus, the effect of the decision below is to deprive regulated companies of the opportunity to exercise rights under the bankruptcy laws that are available to all other companies.

By permitting exclusive-jurisdiction statutes to trump Section 1334(b)'s grant of bankruptcy jurisdiction, the judgment of the Second Circuit in this case violates the congressional plan, gives federal agencies an overwhelming and unfair advantage over other creditors in bankruptcy proceedings, and all but eliminates the ability of bankruptcy courts to enforce the provisions of the Code in the everyday administration of a bankruptcy case when a federal agency is involved in the proceedings. The decision validates even the most egregious form of federal agency interference with the administration of bankruptcy estates, because it precludes bankruptcy courts from enforcing federal agency compliance with fundamental Code provisions designed to protect

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[12] *See, e.g., Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987) ("The clear language of [chapter 11], as well as the Bankruptcy Rules applicable thereto, does not authorize the payment in part or in full, or the advance of monies to or for the benefit of . . . claimants prior to the approval of the plan of reorganization."); Pet. App. 68a-72a.

the debtor's assets for the benefit of all creditors. This Court's review is essential to prevent the decision below from upsetting the careful balance struck by Congress in the Bankruptcy Code.

CONCLUSION

The judgment of the court of appeals flatly contradicts Congress's unambiguous grant of bankruptcy-court jurisdiction, the decisions of this Court, and the holdings of every other court of appeals that has addressed the important question at issue in this case. Accordingly, the Court may wish to consider summary reversal, vacating the judgment of the court of appeals and remanding to permit the normal process of appellate review of the bankruptcy court's automatic stay order to proceed. SUP. CT. R. 16.1. In the alternative, the petition for a writ of certiorari should be granted and the case set for full briefing and argument.

Respectfully submitted.

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September 21, 2000

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In re FEDERAL COMMUNICATIONS COMMISSION, Petitioner.

No. 992, Docket No. 99-5063.

217 F.3d 125

May 25, 2000

OPINION:

JACOBS, Circuit Judge:

The Federal Communications Commission ("FCC") petitions this Court for a writ of mandamus to the United States Bankruptcy Court for the Southern District of New York (Hardin, *B.J.*). On February 7, 2000, the bankruptcy court issued an order prohibiting the FCC from re-auctioning spectrum licenses previously held by debtor NextWave Personal Communications, Inc. ("NextWave"). The FCC argues that the bankruptcy court's order violated this Court's mandate, expressed in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (*NextWave* Appeal), which held that it was beyond the bankruptcy court's jurisdiction "to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 54.

In our *NextWave* decision, this panel (1) rejected the bankruptcy court's determination that the FCC's requirement of full payment as a condition for spectrum licensure lacked a regulatory purpose, and (2) reversed a judgment modifying that condition. On remand, the bankruptcy court has (1) determined that the FCC's requirement of timely payment as a licensing condition is without regulatory purpose, and (2) nullified an FCC decision based on an asserted violation of that condition. The FCC contends that the *timely*-payment requirement

(like the *full*-payment requirement) is (1) a regulatory condition for licensure, (2) within this Court's *NextWave* mandate, and (3) in any event, outside the limited jurisdiction of the bankruptcy court.

Because we conclude that the bankruptcy court's ruling violates our prior mandate, and that the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court, the petition is GRANTED. We make no comment on the prospects of the (precautionary) appeals filed by NextWave in the Court of Appeals for the District of Columbia Circuit.

BACKGROUND

A. The previous appeal[1]

In summer 1996, NextWave was the high bidder at FCC auctions for 63 personal communications services ("PCS") spectrum licenses (the "Licenses"). NextWave's winning bids aggregated $4.74 billion. Because NextWave enjoyed the status of a "small business," only ten percent of the amount bid was required to be paid in cash. *See* 47 C.F.R. § 24.711(b)(3). On February 14, 1997, following some further proceedings to correct NextWave's noncompliance with statutory ownership requirements, the FCC granted the Licenses to NextWave, conditioned upon issuance of a series of promissory notes for the $4.27 billion balance of NextWave's obligations. NextWave promptly executed the notes.

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[1]This Court's previous opinion contains a more complete recounting of relevant events that occurred prior to the December 22, 1999 issuance of that opinion. *See NextWave* Appeal, 200 F.3d at 46-50.

By the time these notes were executed, further auctions had been conducted at which similar licenses had been auctioned at prices significantly lower than NextWave's winning bids. Alarmed that as a result it had bid beyond its capacity to obtain financing, NextWave sought relief from the FCC and the Court of Appeals for the District of Columbia Circuit. Those efforts were unsuccessful.[2] On June 8, 1999, NextWave filed a bankruptcy petition under Chapter 11 and commenced an adversary proceeding against the FCC. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) (*NextWave I*).

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[2]*See NextWave Telecom Inc. v. FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 5, 1998) (order denying stay pending review); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date (Order)*, 13 F.C.C.R. 11880, 1998 WL 278735 (FCC June 1, 1998); *see* also In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, 12 F.C.C.R. 16436, 1997 WL 643811 (FCC Oct. 16, 1997); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Order on Reconsideration of the Second Report and Order)*, 13 F.C.C.R. 8345, 1998 WL 130176 (FCC Mar. 24, 1998); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Second Order on Reconsideration of the Second Report and Order)*, FCC 99-66, 14 F.C.C.R. 6571, 1999 WL 183822 (FCC Apr. 5, 1999).

In the adversary proceeding, NextWave alleged that the transaction by which it was granted the Licenses was a fraudulent conveyance and therefore avoidable under § 544 of the Bankruptcy Code. *See id.* at 269 (citing 11 U.S.C. § 544). The FCC argued that the bankruptcy court lacked subject matter jurisdiction over NextWave's claim because exclusive jurisdiction to review FCC regulatory actions is lodged in the courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The bankruptcy court rejected this argument, holding that in its effort to collect the full auction price of the Licenses, the FCC was acting solely as a creditor, and not as a regulator. *See NextWave I*, 235 B.R. at 269-71. The bankruptcy court thus concluded that subject matter jurisdiction was sound and proceeded to try NextWave's claims.

At the conclusion of trial, the bankruptcy court found that at the time the Licenses were granted, they were worth only $1.023 billion (determined by comparison to similar licenses auctioned subsequently), and that any obligation in excess of that amount was avoidable as a constructive fraud. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 304 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*). In effect, the avoidance remedy reduced by more than three-quarters the total amount NextWave had bid at auction. *See* 11 U.S.C. § 544; *NextWave IV.A*, 235 B.R. at 304; *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 305, 306-07 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*).

The FCC appealed the bankruptcy court's judgment to the United States District Court for the Southern District of New York (Brieant, *J.*), which affirmed for reasons substantially the same as those stated by the bank-

ruptcy court. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315-16, 319-21 (S.D.N.Y. 1999).[3]

The FCC appealed to this Court. On November 24, 1999, we issued an order (with opinion to follow) reversing the ruling that NextWave's obligation to the FCC was a fraudulent conveyance, and we remanded the case to the bankruptcy court for further proceedings. *See NextWave* Appeal, 200 F.3d at 45-46, 62.

Our opinion issued on December 22, 1999. We explained that spectrum licenses (of which PCS licenses form a subset) are distributed by auction because "a method was needed that would direct licenses toward those entities and technologies that would put them to the best use," and because "Congress came to the conclusion that using market forces to allocate spectrum"

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[3]The district court affirmed five decisions of the bankruptcy court: *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying the motion to lift the automatic stay) (*NextWave V*); *NextWave IV.A*, 235 B.R. 277 (May 12, 1999 decision on the fraudulent conveyance claim), *supplemented by NextWave IV.B*, 235 B.R. 305 (June 22, 1999 decision on remedy); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of the FCC's motion to dismiss) (*NextWave III*); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to the FCC and granting to the debtor partial summary judgment with regard to the date upon which the obligations were incurred) (*NextWave II*); and *NextWave I*, 235 B.R. 263 (Dec. 7, 1998 decision granting in part and denying in part the FCC's motion to dismiss).

would best achieve such a distribution. *Id.* at 51. In authorizing the FCC to develop a system of spectrum auctions, Congress had regulatory objectives, and was not chiefly interested in maximizing license-holders' contributions to the fisc:

> [T]he broader purpose of [47 U.S.C. § 309(j), the statutory provision authorizing spectrum auctions,] was to create *an efficient regulatory regime* based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue. Instead, it was told to auction licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public.

NextWave Appeal, 200 F.3d at 52 (emphasis added; footnote omitted).

Congress mandated that spectrum licenses be distributed by auction because auction "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." *Id.* at 59. The auction-based scheme "reflect[s] a classical belief in the efficacy of market forces," the "fundamental rationale" of which is that "[t]hose qualified bidders" most likely to make efficient, technologically dynamic use of the spectrum are, on average, those to whom the spectrum licenses are most valuable, and therefore are "those who should be awarded the licenses." *Id.* at 52-53. Thus the spectrum auctions are "a *regulatory tool* for ensuring that licenses are distributed in the way that fulfils the goals of the [Federal Communications Act ('FCA')]." *Id.* at 53 (emphasis added).

Having determined that the purpose of spectrum auctions was chiefly regulatory, not fiscal, we then turned to the FCC's exclusive jurisdiction over regulation of the spectrum. Noting that the FCC's exclusive jurisdiction over licensing matters extended to the conditions placed on licenses, we held that "[w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated," it is exercising a quintessentially regulatory power. *Id.* at 54. We recognized that pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402, review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts. *See id.*

Finally, we examined the bankruptcy court's decisions to determine whether they intruded upon the FCC's exclusive jurisdiction over spectrum licensing and the courts of appeals' exclusive jurisdiction to review the FCC's licensing decisions. We determined that the full payment of winning bids was a regulatory condition for the retention of licenses by successful bidders:

> NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, *in regulatory terms*, that NextWave was not entitled to the Licenses.

Id. (emphasis added). Because "[t]he FCC's auction rules . . . have primarily a regulatory purpose," we held that the approach taken by the bankruptcy and district courts--which allowed NextWave to keep PCS licenses under conditions that the FCC considered non-compliant--was "fundamentally mistaken." *Id.*

We thus held that even where the regulatory conditions imposed on a license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation. Therefore, "even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis." *Id.* at 55 (emphasis added; internal citations omitted).

B. Subsequent events

On December 16, 1999--after this Court held that the FCC's licensing requirements were not subject to alteration in the bankruptcy court--NextWave filed modifications to its proposed plan of reorganization. Until then, NextWave had been contending that payment of the $4.27 billion still owed was beyond its capacity and that the incurring of the debt was a constructive fraud. But under its proposed modifications to the plan, NextWave would pay in full its overdue obligation to the FCC and undertake to pay the notes as they come due.[4] *See In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000) ("*NextWave VI*").

On January 11, 2000, NextWave sweetened its offer to the FCC and proposed to pay in a single lump sum the

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[4]The bankruptcy court characterizes the modifications proposed on December 16 as an offer made "regardless of the outcome of the appeal in the Circuit Court." *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000). The order reversing the judgment below was issued on November 24, however, so the outcome of the FCC's appeal was known at the time of the proposed modifications. *See NextWave* Appeal, 200 F.3d at 45-46.

present value of its billions of dollars in notes. The lump-sum payment proposal was new and not part of NextWave's proffered modifications.

The day after NextWave's lump-sum offer, on January 12, 2000, the FCC issued a Public Notice of an "Auction of C and F Block Broadband PCS Licenses" (the "Public Notice"), in which the FCC announced the re-auction of the Licenses then held by NextWave. The Public Notice made no mention of the previous licensee, but the FCC's memorandum objecting to the modified reorganization plan explains that the cancellation of the Licenses was occasioned by NextWave's default under the terms of the Licenses. According to the FCC, that default resulted in the "automatic[] cancel[l]ation" of the Licenses. *See id.*

In particular, NextWave had failed to make timely payments on the Licenses, as the licensing agreements obligated it to do. The FCC maintains that such a failure results in automatic license cancellation:

> In light of the Second Circuit's ruling, it is clear that the Debtors' C and F block PCS licenses automatically canceled pursuant to the terms and conditions upon which they were granted. Given that a licensee's failure to comply with a license's full and timely payment condition automatically results in the termination of a spectrum authorization, requiring no affirmative steps by the FCC, *see* 47 C.F.R. § 1.2110, . . . the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, are not implicated by the cancellation of the Debtors' C and F block PCS licenses. . . . Accordingly, the Debtors are divested of their C and F block PCS spectrum rights. . . .

Objection of Federal Communications Commission to Debtors' Modified First Amended Joint Plan of Reorganization, *In re NextWave Personal Communications, Inc.*, No. 98 B 21529 (ASH), at 3-4 (Bankr. S.D.N.Y.

Jan. 12, 2000) (FCC Objection). According to the Public Notice, the auctions are scheduled for July 26, 2000.

NextWave moved by order to show cause for an order declaring the Public Notice null and void. *See NextWave VI*, 244 B.R. at 257. The bankruptcy court granted NextWave's motion on January 31, 2000, stating the following three reasons:

> (1) Because the Licenses constituted "property of the estate," their revocation (via the Public Notice) violated the automatic stay of the Bankruptcy Code. *See NextWave VI*, 244 B.R. at 266-68 (citing 11 U.S.C. § 362(a)(1), (3)-(6)).
>
> (2) Because the cure provisions of the Bankruptcy Code, 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A), allow NextWave to cure any default--*i.e.*, they allow NextWave to "revers[e]" the event that triggers default--the FCC cannot rely on any default as a premise for revoking the Licenses. *Id.* at 268-69 (citing *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982)).
>
> The bankruptcy court further held that the default cited by the FCC was in fact no default, regardless of the opportunity to cure, because NextWave was barred from making payments absent an order of the bankruptcy court, given subsequent to a hearing: "[T]he debtors had neither the authority nor the ability to make [those] payments absent notice and court approval." *NextWave VI*, 244 B.R. at 274-76; *see also* 11 U.S.C. §§ 102(1), 363. According to the bankruptcy court, NextWave's non-payment was compelled by the automatic stay and therefore cannot be an event of default: "Any notion of a legally cognizable 'default' presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first instance." *Id.* at

274. The bankruptcy court therefore considered it "senseless to speak of a 'default'" in this case. *Id.* at 276.

(3) Under the doctrines of waiver and equitable estoppel, the FCC is now barred from revoking the Licenses because it failed earlier to contend that the Licenses were forfeit. *See id.* at 276-81.

By order dated February 7, 2000, the bankruptcy court granted NextWave's motion for an order enforcing the automatic stay and decreed that the FCC's Public Notice was "null, void, and without force or effect." *In re NextWave Personal Communications Inc.*, No. 98 B 21529 (ASH) (Bankr. S.D.N.Y. Feb. 7, 2000) (order enforcing the automatic stay with respect to the Licenses).

The FCC promptly petitioned this Court for a writ of mandamus on the ground that the bankruptcy court's ruling obstructs our mandate.

DISCUSSION

This Court has the authority to grant writs of mandamus under Rule 21(a) of the Federal Rules of Appellate Procedure; but the standard for issuance is stringent, and such writs are rarely issued. Mandamus is not used simply to correct error. *See Will v. United States*, 389 U.S. 90, 98 n.6, 88 S. Ct. 269, 275 n.6, 19 L. Ed. 2d 305 (1967); *In re Steinhardt Partners, L.P. (Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.)*, 9 F.3d 230, 233-34 (2d Cir. 1993). It is reserved for "judicial usurpation[s] of power" by inferior courts. *Will*, 389 U.S. at 95, 88 S. Ct. at 273 (citation and internal quotation marks omitted); *accord Mallard v. United States Dist. Court*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989). Mandamus is properly granted for two purposes:

(1) Protection of a superior court's mandate, *see General Atomic Co. v. Felter*, 436 U.S. 493, 497, 98 S. Ct. 1939, 1941, 56 L. Ed. 2d 480 (1978), to

> assure that "the terms of the mandate [are] scrupulously and fully carried out," and that the inferior court's "actions on remand [are] not . . . inconsistent with either the express terms or the spirit of the mandate," *In re Ivan F. Boesky Sec. Litig. (Kidder, Peabody & Co. v. Maxus Energy Corp.)*, 957 F.2d 65, 69 (2d Cir. 1992) (citation and internal quotation marks omitted); or
>
> (2) Restraining an inferior court from detours into areas in which it lacks jurisdiction (or, in some instances, forcing an inferior court to take an obligatory action), *see Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L. Ed. 1014 (1943).

Generally, mandamus is appropriate only where no other remedy adequately protects the petitioner's interest. *See In re von Bulow (von Bulow ex rel. Auersperg v. von Bulow)*, 828 F.2d 94, 98 (2d Cir. 1987). Such a situation exists where the time required for the ordinary appeals process would deprive the petitioner of the right it claims (here, to re-auction the Licenses on the announced date, July 26, 2000). *See In re King World Prods.*, 898 F.2d 56, 58-59 (6th Cir. 1990) (listing among the factors to be considered when determining the propriety of mandamus whether "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," as well as whether "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"); *cf. In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992) (holding an alternative remedy to be inadequate where it would have caused great delay in the vindication of the petitioners' rights). This Court will grant a mandamus petition only where the petitioner's right to relief is "clear and indisputable." *In re International Bus. Machs. Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18, 103 S. Ct. 927,

938, 74 L. Ed. 2d 765 (1983)) (internal quotation marks omitted).

The questions presented by this petition are whether the bankruptcy court's decision amounted to review of the FCC's "regulatory" actions, as we used that term in our opinion of December 22, 1999, *see, e.g.*, *NextWave* Appeal, 200 F.3d at 54; if so, whether that court's actions derogated from "either the express terms or the spirit of the mandate," *In re Boesky*, 957 F.2d at 69; and whether (even absent that mandate) the bankruptcy court exceeded its statutory jurisdiction by engaging in such review. We conclude that the bankruptcy court's decision: (1) amounted to the review of an order or decision of the FCC, for which the bankruptcy court lacks jurisdiction, and (2) contravened this Court's mandate. We therefore grant the petition.

A. The bankruptcy court's decision

The FCC argues that the requirement of timely payment, like the requirement of payment in full, is driven by regulatory considerations. The Commission further argues that the regulatory nature of the disputed requirement is manifest in this Court's opinion of December 22, 1999.

In the previous appeal, the district court had held that the FCC's claim to full payment "ha[d] nothing to do with the FCC's organization, execution, or implementation of the radio spectrum auction. Neither did the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses." *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315 (S.D.N.Y. 1999) (internal quotation marks omitted). We held that such an approach "was fundamentally mistaken." *NextWave* Appeal, 200 F.3d at 54. Recognizing that "NextWave's inability to follow through on its financial undertakings had more than financial implications," we held that the FCC's decision as to "which entities are entitled to spec-

trum licenses under rules and conditions it has promulgated" is a paradigmatic instance of the FCC's exclusive regulatory power over licensing. *Id.*

The FCC's Public Notice of re-auction presented the bankruptcy court with a variation on the same question: whether it could undo the consequences of NextWave's failure to fulfill the timely-payment requirement under the Licenses, as determined by the FCC. The bankruptcy court properly characterized the issue as whether timely payment was a regulatory condition for licensure, and it then held that this Court's previous mandate does not control that question, *see NextWave VI*, 244 B.R. at 283, that is, that while *full* payment is a regulatory condition, *timely* payment is not. The bankruptcy court's reasoning on this issue is set forth in the margin.[5]

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[5]Judge Hardin rejected, as follows, the FCC's contention that this Court's mandate controlled the issue of whether timely payment was a regulatory condition:

> Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.
>
> The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses.

[Footnote continued on next page]

Recognizing that it lacked power to review FCC regulatory actions, the bankruptcy court sought to cast the dispute in non-regulatory terms. Thus the court concluded that the FCC's declaration of a default (1) "lack[ed] any comprehensible regulatory objective," *id.* at 270, and (2) was therefore simply the action of an ordinary creditor:

> The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.

Id. at 281.

[Footnote continued from previous page]

> The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's failure to make post-petition payments on its pre-petition claims.

NextWave VI, 244 B.R. at 283 (internal citation omitted).

This statement is at odds with our previous opinion. We expressly deferred to the FCC's "expert judgment as to the course that would best promote congressional objectives and serve the public interest," *NextWave* Appeal, 200 F.3d at 53; and we ultimately held that "when the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the *full extent of its regulatory capacity*." *Id.* at 54 (emphasis added). The bankruptcy court finds that "[n]o rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics." *NextWave VI*, 244 B.R. at 281. This misses the point. The FCC need not defend its regulatory calculus *in the bankruptcy court*; whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it.

The FCC's decision to re-auction the Licenses previously granted to NextWave is one that implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy court's deference. Moreover, the regulatory purpose for requiring payment in full--the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum--is quite obviously served in the same way by requiring payment on time. Given this evident analogy, our analysis of the full-payment obligation (in our previous opinion) should have alerted the bankruptcy court that the FCC's determination as to prompt payment was by nature regulatory. Time of payment and amount of payment are alike functions of value. *Cf. Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. # 1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1022 (1st Cir. 1995) ("Time is money . . . ."). There can be little doubt that if full payment is a regulatory condition, so too is timeliness. *See NextWave* Appeal, 200 F.3d at 59-60 (detailing the regulatory purpose behind the FCC's general insis-

tence on payment according to the terms set at auction, so that the "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue"); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 522 (D.C. Cir. 1999) ("[T]he Commission . . . gave fair notice of the importance it attaches to meeting payment dates . . . ."); FCC Objection at 2-4. "The Commission has long noted the importance it attaches to timely payment." *Mountain Solutions*, 197 F.3d at 519 (citing *In re Implementation of Section 309(j) of the Communications Act, (Second Report and Order)*, 9 F.C.C.R. 2348 ¶ 197, 1994 WL 412167 (FCC Apr. 20, 1994)).

We therefore conclude that the FCC's decision was in fact regulatory. This conclusion is reinforced by the bankruptcy court's own statement of reasons. In the course of deciding that the FCC's re-auction decision lacked any regulatory purpose, the bankruptcy court was in effect and in fact questioning the FCC's regulatory judgments:

> What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses? How does the [Public Notice] coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues["?]

NextWave VI, 244 B.R. at 282-83. Whatever the force of these rhetorical questions, the answers entail regulatory

decisions and are outside the jurisdiction of the bankruptcy court.[6]

In considering another of NextWave's arguments, the bankruptcy court explicitly questioned the rationale behind the FCC's decision to re-auction the Licenses:

> Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in

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[6] *See also, e.g., NextWave VI*, 244 B.R. at 263 (in rejecting the FCC's finding of a default, reasoning that "[t]he existence of a default here depends upon an interpretation of the FCC's regulations"); *id.* ("Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported 'regulatory default.'"); *id.* at 264 ("The FCC argued that, despite the language 'will be declared in default,' it was incumbent on the debtors, before a 'default' occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise."); *id.* at 281 n.26 ("[O]ne must wonder what was the impact on [the FCC's regulatory] objective of . . . the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines. . . . ").

> January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephone is developing at lightning speed, such that another year's delay is of great significance.

Id. at 271.

Although the bankruptcy court's opinion is stated in terms of whether timely payment is a regulatory condition, the question posed and answered is whether the regulatory condition of timely payment is arbitrary. Elsewhere, the bankruptcy court flatly rejects the idea that the FCC can have anything to say about communications licenses in the hands of debtors: "[O]ne must ask whether there is *any* regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar jurisdiction of the Bankruptcy Court from enforcing the Code." *Id.* at 282 (emphasis added).

In short, the FCC made timely payment a regulatory condition; and the bankruptcy court has concluded that such a condition is arbitrary, in the sense that it serves no regulatory purpose that the bankruptcy court is prepared to recognize. However, a regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid.

B. Mandamus

Our extraordinary mandamus power has two purposes: to achieve compliance with the terms and spirit of our mandates, and to constrain inferior courts to proper exercises of their jurisdiction. In this case, the two uses of mandamus overlap and reinforce one another. This Court's previous opinion reversed a decision of the

bankruptcy court on the ground that that court lacked jurisdiction. The bankruptcy court again seeks to control the FCC's allocation of licenses, notwithstanding this Court's express holding that "the bankruptcy and district courts lack[] jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." *NextWave* Appeal, 200 F.3d 43 at 54. Thus a writ of mandamus protecting this Court's mandate also confines the inferior court to the lawful exercise of its jurisdiction.

1. The mandate

Our prior opinion clearly and repeatedly emphasizes that the bankruptcy court is without power to review the FCC's regulatory actions:

> If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee by allowed to keep its license despite its failure to meet the conditions to which the license is subject.
>
> *When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity.* Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, *the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by* the FCC upon its retention of the Licenses.

Id. (emphasis added).

In supporting this jurisdictional holding, this Court discussed the "spheres of authority" within which agencies and courts operate:

> For over fifty years the Supreme Court has recognized that under the FCA the division of authority between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L. Ed. 1229, (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 91 L. Ed. 204 (1946).

Id.

Our mandate required the bankruptcy court to refrain from impeding the regulatory actions of the FCC, in particular, the FCC's enforcement of the payment schedule established by its regulations, orders, and decisions. The bankruptcy court founds its jurisdiction for doing so chiefly on the automatic stay provision of 11 U.S.C. § 362 and on that court's power under the provision to decide what acts are prevented. The bankruptcy court declared the Public Notice to be null and void because:

> The [Public Notice] implicates subsections (1) and (6) and it unarguably violated subsections (3), (4) and (5) [of 11 U.S.C. § 362(a)]. Accordingly, the [Public Notice] was void.

NextWave VI, 244 B.R. at 267-68. The extensive briefing on this petition for mandamus is largely directed to this question.

The automatic stay has its limits. Here, the applicable limit is set forth in 11 U.S.C. § 362(b)(4), which

provides an exception under paragraphs (1), (2), (3) and (6)[7] for:

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4) (West Supp. 1999). Undoubtedly, the FCC is a governmental unit that is seeking "to enforce" its "regulatory power." Nevertheless, the bankruptcy court decided that "[§] 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct attempt to enforce its pecuniary interests." *NextWave VI*, 244 B.R. at 274. This observation is flatly incompatible with this Court's mandate, as expressed in our earlier opinion. Because the timing of NextWave's payment obligation--like the amount of it--was a subject of FCC regulation, and therefore within our NextWave mandate, the bankruptcy court's decision violated that mandate.[8]

In short, notwithstanding the automatic stay provision, the bankruptcy court lacks jurisdiction to decide whether the FCC's regulatory decision is a proper exer-

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[7]Subsections (4) and (5) are concerned with liens. *See* 11 U.S.C. § 362(a)(4), (5). The bankruptcy court does not explain why they are implicated here.

[8]Though we hold that the FCC's regulatory decisions fall within § 362(b)(4), we have no occasion to opine on whether the Public Notice is valid or whether the Licenses automatically canceled at some prior date.

cise of discretion, or to decide whether it is provident and in the public interest. All of these decisions are within the exclusive jurisdiction of the federal courts of appeals:

> [Petitioner] contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the [agency's] actions and to enjoin those actions. We disagree. [Petitioner's] broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts.

Board of Governors v. MCorp Fin., Inc., 502 U.S. 32, 40, 112 S. Ct. 459, 464, 116 L. Ed. 2d 358 (1991). The bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped.

NextWave and various amici curiae emphasize that our mandate was limited by the disclaimer in our *NextWave* opinion that "since we do not know what steps the FCC will take vis-à-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe." *Id.* at 59. But the bankruptcy court's latest opinion was not prompted by any *collection* effort; the whole thrust of the opinion is that the FCC is unjustifiably *refusing* to take NextWave's money. In any event, this passage cannot be read as a limitation on the scope or effect of

what our opinion actually decided. It is sufficiently clear that the issue raised by the timely-payment requirement was decided in our opinion: "We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC." *Id.* at 55. Even if the bankruptcy court is right on the merits of its arguments against revocation--we have no occasion to express an opinion--it is without power to act on its determination:

> [E]ven if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis.

Id. (citation omitted; emphasis added).

The bankruptcy court construes our mandate to mean no more than that the bankruptcy court may not abrogate the full-payment requirement on the basis of a fraudulent-conveyance holding. This under-reads our previous opinion. True, the immediate effect of the mandate was to prohibit abrogation of the full-payment requirement; but the opinion clearly instructs the bankruptcy court to refrain from interfering with the licensing decisions of the FCC.

2. Jurisdiction

Just as this Court may use its mandamus power to require compliance with its mandates, it may also issue the writ to restrain an inferior court to proper exercises of that court's jurisdiction. *See Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L. Ed. 1014 (1943). Our previous decision was founded on congressionally imposed limits on jurisdiction. As discussed below, those jurisdictional limitations apply here with equal force.

Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939, 80 L. Ed. 2d 480 (1984); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("Exclusive jurisdiction over review of final FCC orders is vested in the Court of Appeals . . . ."); *see also NextWave* Appeal, 200 F.3d at 54 ("[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402 . . . ."). This exclusivity extends as well to collateral attacks: "A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000).

The jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise. Each statutory provision that governs appeals and petitions for review from FCC decisions is broadly phrased, as follows:

Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals:

> *Any proceeding* to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and *in the manner prescribed in chapter 158 of Title 28.*

47 U.S.C. § 402(a) (emphasis added). The "manner prescribed in chapter 158 of Title 28" confines such petitions to the courts of appeals:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend

> (in whole or in part), or to determine the validity of--
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . .

28 U.S.C. § 2342 (emphasis added).

Section 402(a) makes an exception for cases that fall under § 402(b), but again offers no opening to the bankruptcy court. Cases that fall within § 402(b) are appealable only in the Court of Appeals for the District of Columbia Circuit:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> * * *
>
> (5) By the holder of any construction permit or *station license* which has been modified or revoked by the Commission.

47 U.S.C. § 402(b)(5) (emphasis added). PCS licenses are "station licenses" within the technical meaning of § 402(b)(5), and fall within its ambit.[9]

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[9]The statutory definitions clarify that the term "station license" means the "instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio." 47 U.S.C. § 153(42) (Supp. 1999). Transmission by radio is defined broadly to include all electromagnetic broadcast transmissions, not just those transmitting traditional broadcast-radio content. *See id.* § 153(33). The FCC has "'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" *United States v. Southwestern Cable Co.*, 392 U.S.

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Section 402(b) is applicable to all appeals from the FCC's licensing actions: "The language of this subsection [*i.e.*, § 402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of *all cases involving the exercise of the Commission's radio licensing power* is limited to [the Court of Appeals for the D.C. Circuit]." *Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968) (quoting S. Rep. No. 82-44, at 10 (1951)) (emphasis added; internal quotation marks omitted). NextWave remains free to pursue its challenge to the FCC's regulatory acts.[10] In

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157, 168, 88 S. Ct. 1994, 2000, 20 L. Ed. 2d 1001 (1968) (quoting S. Rep. No. 73-781, at 1 (1934)) (referring to 47 U.S.C. § 153(b), (cc) (1965), *recodified* at 47 U.S.C. § 153(33), (42) (Supp. 1999)).

[10]Section 402 specifies exclusive jurisdiction for appeals from FCC "decisions" and "orders." Here, the FCC has issued no order formally announcing the cancellation of the Licenses; revocation is made explicit in a filing before the bankruptcy court (which filing is not itself an order) and is implicit in the Public Notice announcing the re-auction of the Licenses previously held by NextWave. Nevertheless, as this Court's prior opinion makes clear, we think that the FCC action in question is unmistakably regulatory in nature. But even if the FCC's acts do not amount to "decisions" or "orders" of the Commission, subject to the jurisdiction of the courts of appeals, that would not expose the FCC's acts to review in the bankruptcy court. A regulatory action short of a decision or order is an exercise of regulatory discretion that is *not* subject to review. *See Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (holding that a regulatory action that did not impose an obligation, deny a right, or fix a legal relationship was not reviewable); *see also, e.g., Telecommunications Research & Action Ctr.*,

[Footnote continued on next page]

response to the FCC's revocation of the Licenses, NextWave has filed protective notices of appeal in the D.C. Circuit, one under § 402(a) and the other under § 402(b). Cases within § 402(a) and cases within § 402(b) are "mutually exclusive." *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997) (citation and internal quotation marks omitted). But as noted in those notices of appeal, NextWave expects that the D.C. Circuit will simply dismiss whichever appeal is

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750 F.2d at 78-79 ("[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." (emphasis added)); *Illinois Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975) ("[T]o be final an order must impose an obligation, deny a right or fix some legal relationship . . . ." (citation and internal quotation marks omitted)).

In this case, we have no doubt that the Public Notice of the Auction of C and F Block Broadband PCS Licenses is an appealable decision or order of the FCC. *See, e.g., Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 520 n.12 (D.C. Cir. 1999) (treating denial of a waiver as an "adjudicatory decision"); *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 452 (D.C. Cir. 1974); *cf. Mesa Airlines v. United States*, 951 F.2d 1186, 1188 (10th Cir. 1991); *California Assoc. of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1988).

The FCC's Notice announced that specified licenses--those formerly possessed by NextWave--were to be reauctioned. It is easy to conclude that this "den[ies] a right." *Illinois Citizens Comm.*, 515 F.2d at 402. And if that decision is appealable, its regulatory nature requires that it be appealed in the court of appeals.

improper. *See, e.g., Tribune Co. v. FCC*, 328, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998); *Kessler v. FCC*, 326 F.2d 673, 679 n.4 (D.C. Cir. 1963).

CONCLUSION

We conclude that the bankruptcy court acted in derogation of this Court's mandate and beyond its statutory jurisdiction when it nullified the FCC's Public Notice. The violation of our mandate and the jurisdictional defect are independently sufficient to justify mandamus.

Accordingly, the petition for a writ of mandamus is GRANTED. The bankruptcy court is directed to vacate its order of February 7, 2000, and to enter an order denying NextWave's motion for enforcement of the automatic stay with respect to the Licenses.

In re NEXTWAVE PERSONAL COMMUNICATIONS INC., et al., Debtors.

Bankruptcy No. 98 B 21529 (ASH).

UNITED STATES BANKRUPTCY COURT,

S.D. OF NEW YORK.

244 B.R. 253,

Jan. 31, 2000

Following declaration by the Federal Communications Commission (FCC) that it considered debtors' licenses to provide telecommunications services as having been automatically cancelled for debtors' nonpayment of prepetition debt, debtors moved for order holding the FCC's declaration as void by virtue, among other things, of automatic stay. The Bankruptcy Court, Adlai S. Hardin, Jr., J., hold that: (1) conduct of the FCC, in declaring debtors in default of their obligation to make installment payments to the FCC, and in notifying debtors that licenses had been automatically cancelled, violated automatic stay as attempt by the FCC to exercise control over licenses constituting "property of the estate"; (2) allegedly "automatic" cancellation of debtors' licenses also violated stay; (3) FCC, in seeking to declare a cancellation of debtors' licenses based upon their nonpayment of prepetition debt, was not exercising its "police or regulatory power"; (4) debtors' obligation to pay sum of $4.7 billion to the FCC was not obligation that debtors could pay postpetition, in ordinary course of their business; and (5) FCC waived its right to assert that debtors' licenses had been cancelled.

Motion granted.

Andrews & Kurth, L.L.P., By Deborah L. Schrier-Rape, Gregory H. Bevel, Dallas, TX, for Debtors.

Mary Jo White, United States Attorney For The Southern District Of New York, By Daniel S. Alter, Neil M.

Corwin, New York, for Creditor Federal Communications Commission.

Kasowitz, Benson, Torres & Friedman, LLP, By David S. Rosner, New York, for Unsecured Creditors Committee.

Salans Hertzfeld Heilbronn Christy & Viener, By William F. Gray, Emanuel C. Grillo, New York, for DIP Lender, D&P NextWave Partners, L.P.

DECISION ON MOTION TO ENFORCE THE AUTOMATIC STAY

ADLAI S. HARDIN, Jr., Bankruptcy Judge.

On January 12, 2000 the Federal Communications Commission ("FCC") gave public notice (the "January 12 Declaration") to the debtors (collectively, the "debtors" or "NextWave") in these jointly administered Chapter 11 cases that all of NextWave's C block and F block licenses (the "Licenses") for broadband personal communications service ("PCS") had been automatically cancelled under FCC regulations as of late 1998 or January 1999. The January 12 Declaration was issued a scant nine days before the scheduled January 21, 2000 hearing on NextWave's Modified First Amended Joint Plan of Reorganization (the "Plan"), under which NextWave proposed to pay *in full* the balance of its outstanding installment obligations to the FCC and all amounts owing to unsecured creditors.

Aside from the Draconian economic consequences of cancellation to other creditors and equity, the January 12 Declaration was shocking because it followed over one year of intense litigation costing the debtors' estates upwards of $10 million in professional fees and other expenses in three Federal courts entailing expenditure of untold hours of judicial resources by one Bankruptcy Judge (Hardin), at least four District Judges (Brieant, Parker, Pollack, Chin) and at least three Circuit Judges (McLaughlin, Jacobs, Sack), all of which was premised

on the assumption that the Licenses were vested in NextWave, and all of which was utterly unnecessary and incomprehensible if the Licenses had in fact and law been automatically cancelled over a year ago. The January 12 Declaration conflicted with countless written and oral utterances and acts of the FCC throughout the past year. And, astonishingly, the January 12 Declaration followed by one day a letter from the President of NextWave to the Chairman of the FCC offering to satisfy NextWave's entire ten-year installment obligation to the FCC by making a single lump sum payment upon confirmation in excess of $4.3 billion.

Faced with catastrophic consequences to all parties in interest in these debtors' estates, NextWave moved by order to show cause returnable January 21, 2000 for an order holding the FCC's January 12 Declaration null and void on the grounds, *inter alia*, that it violated the automatic stay, 11 U.S.C. § 362(a). As amplified below, the motion is granted for three quite separate reasons: (I) the January 12 Declaration violated the Bankruptcy Code; (II) the debtors cannot be held to have defaulted for failure to make payments on a pre-petition claim which they could not make under the Code without a court order; and (III) the FCC is barred by its own conduct from asserting a retroactive forfeiture under the doctrines of equitable estoppel and waiver.

Jurisdiction

This Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b).

Background

The material facts in these Chapter 11 proceedings have been set forth in varying detail in five published decisions of this Court, one decision of the District

Court and one published decision of the Court of Appeals, all briefly described below. This decision will set forth the factual and decisional background only to the extent necessary to give context to the issues presented and decided on this motion. For a more comprehensive statement of facts, *see NextWave IV.A*, 235 B.R. 277.

On May 6 and July 16, 1996, NextWave was declared the high bidder for 63 licenses in the FCC's auction and reauction, respectively, of C block licenses (the "C Licenses"). NextWave filed the required long form applications seeking FCC approval, to which objections were filed. On January 3, 1997 the FCC announced that NextWave would receive its C Licenses, conditioned on compliance with its financial obligations to the FCC.

On January 9, 1997 NextWave made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of its total bid price. On February 19, 1997 NextWave executed notes (the "Notes") and accompanying security agreements in the aggregate face amount of $4,269,283,223 (rounded, $4.3 billion), dated as of January 3, 1997. The FCC awarded the C Licenses to NextWave affiliate NPCI.

Another NextWave affiliate was high bidder for certain F block licenses (the "F Licenses") which were issued to NextWave in the spring of 1997. The litigation with the FCC concerned only the C Licenses, until the January 12 Declaration.

Between the conclusion of the C block auction and reauction on May 6 and July 16, 1996 and the actual issuance of the C Licenses in January/February 1997 in exchange for $4.7 billion of cash and Notes, the value of PCS spectrum as perceived in the marketplace plummeted. As a consequence, NextWave and the other C block license winners were unable to raise a single dollar of the estimated $1.6 billion of public financing which the C block licensees needed to build out their PCS systems. Recognizing this fact, the FCC issued or-

ders suspending all payments on both C block and F block licenses in the spring of 1997, conducted public hearings and issued certain restructuring orders.

The NextWave entities filed voluntary petitions under Chapter 11 on June 8, 1998. On the same date NextWave filed the complaint in an adversary proceeding against the FCC alleging two separate causes of action. Count I alleged a claim under Section 544 of the Bankruptcy Code for constructive fraudulent conveyance; Count II sought equitable subordination of the indebtedness to the FCC under Section 510 of the Bankruptcy Code by reason of the FCC's "de facto control" over NextWave and its alleged "inequitable, unconscionable and unfair conduct" between July 1996 and January 1997 (in essence, flooding the market with spectrum in order to drive the "scarcity value" out of spectrum). This Court made six substantive rulings in the adversary proceeding, five memorialized in written decisions. The District Court affirmed all six rulings, and the Court of Appeals reversed the District Court and this Court in a published decision. Each of these rulings will be discussed to the extent appropriate in the context of this motion.

Prior Court Decisions

NextWave I (235 B.R. 263)

In response to the complaint, the FCC simultaneously filed a motion in the District Court to withdraw the reference and a motion to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference in October 1998 and remanded to this Court to decide the motion to dismiss. After a hearing in November, this Court issued its decision denying the motion to dismiss as to Count I (fraudulent conveyance) and granting the motion to the extent of dismissing Count II (equitable subordination). *NextWave I*, 235 B.R. 263 (Bankr. S.D.N.Y. Dec. 7, 1998). Count II was dismissed

because "the second cause of action is based upon conduct of the FCC acting in its regulatory capacity [and] [t]his Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction." 235 B.R. at 265. The motion to dismiss Count I was denied because "the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor." *Id.* This Court concluded that nothing in the enabling statute, Federal Communications Act ("FCA") § 309(j), or elsewhere in the FCA manifested an intention of Congress to preempt the operation of the Bankruptcy Code in cases where the FCC was acting in the capacity of a creditor, whose actions, rights and obligations as a creditor would affect the rights and obligations of other creditors and parties in interest in a debtor's estate.

NextWave II (235 B.R. 272)

The FCC next made a motion for partial summary judgment fixing the date on which NextWave became obligated to pay the $4.7 billion of its winning bids, a crucial determination in a constructive fraudulent conveyance proceeding where the central issue is whether the consideration given by the debtor (cash plus debt) exceeded the value of the property transferred to the debtor in exchange therefor (the C Licenses). Since NextWave's financial obligation to the FCC under the FCC's auction regulations would not have been $4.7 billion but some indeterminable lower figure if for any reason the FCC did not grant NextWave the C Licenses (less than 5% of the $4.7 billion if, for example, the C Licenses were reauctioned for amounts exceeding NextWave' s bids), and since the actual transfer of the C Licenses in exchange for $473 million cash and $4.3 billion of Notes did not take place until January/February

1997, this Court fixed January 3, 1997 as the critical date for constructive fraudulent conveyance purposes.

NextWave III

On April 2, 1999 this Court denied the FCC's second motion to dismiss in an unpublished decision from the bench.

NextWave IV.A (235 B.R. 277)

On May 12, 1999, after a trial on the issue of valuation of the Licenses, this Court issued its Decision on Constructive Fraudulent Conveyance Claim concluding that "$1,023,211,000 may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis." 235 B.R. at 304.

NextWave IV.B (235 B.R. 305)

After a further hearing, on June 22, 1999 this Court issued its Decision on Remedy. Noting the "utter irrationality of the FCC's proposed remedy," 235 B.R. at 311, and rejecting the remedy of rescission which the FCC expressly stated was "not what we seek," 235 B.R. at 308, this Court adopted the traditional constructive fraudulent conveyance remedy of avoidance, the effect of which was to reduce the NextWave obligation from $4.7 billion (10% of which has been paid) to $1,023,000,000, being the actual fair market value of the C Licenses in January/February 1997.

NextWave V (235 B.R. 314)

Following the Decision on Remedy, *NextWave IV.B*, the FCC moved to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The "cause" relied upon was the failure, or rather the prospective failure, of NextWave to pay the full amount ($4.7 billion) of its winning auction bids by reason of this Court's Decision on Remedy in *NextWave IV.B*. As a consequence of the

prospective default, the FCC sought an order for relief from stay from this Court so that the Licenses could be automatically cancelled under the terms of the FCC regulations. Considering the issue thus raised to be governed by the initial decision on subject matter jurisdiction in *NextWave I*, this Court ruled that, since the FCC is subject to the Bankruptcy Code in its capacity as a creditor, the reduction in NextWave's obligation to the FCC in the Decision on Remedy did not result in a present or prospective default and, lacking any default, there was no "cause" to lift the stay. Accordingly, the motion was denied.

The District Court Decision

On July 27, 1999 the District Court (Hon. Charles L. Brieant) issued a decision and order affirming all six aforementioned rulings of the Bankruptcy Court. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999).

The Court of Appeals Decision

On November 24, 1999 the Court of Appeals for the Second Circuit issued an order reversing the judgment of the District Court and remanding the case for further proceedings, with an opinion to follow. The opinion (the "Circuit Court Decision") was issued on December 22, 1999. *Federal Communications Commission v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999). It is not clear whether the FCC appealed *NextWave III*, *NextWave IV.A*, *NextWave IV.B* or *NextWave V*. But it is clear that none of those decisions was addressed in the Circuit Court Decision. The Circuit Court Decision reversed the Bankruptcy Court and the District Court in respect of *NextWave I* and *II*.

With respect to the former, the Circuit Court Decision disagreed with the basic premise of *NextWave I* which distinguished between the FCC acting in its ca-

pacity as a regulatory agency, as to which the District Court/Bankruptcy Court would have no subject matter jurisdiction, and the FCC as a creditor, as to which the District Court/Bankruptcy Court would have jurisdiction to adjudicate debtor-creditor issues arising under the Bankruptcy Code. While recognizing the FCC's dual role as creditor and regulator under FCA § 309(j), the Court of Appeals concluded that the "payment in full" requirement of the FCC regulations, while a credit provision in the context of a C block licensee paying in installments, was also related to a regulatory function as to which the FCC had primary jurisdiction. Starting with the Congressional premise, articulated in the legislative history, that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free," the Circuit Court Decision concluded:

> . . . the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and retaining a spectrum license required through a § 309(j) auction. *See* 47 C.F.R. § 24.708.[1]
>
> This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions.

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[1] 47 C.F.R. § 24.708 states, in relevant part:

> (a) **Except with respect to entities eligible for installment payments** (*see* § 24.711), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon **full and timely payment** of the winning bid amount. (Emphasis supplied)

200 F.3d at 52. Rejecting the Bankruptcy Court's premise that the fraudulent conveyance claim "concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave]" and the District Court's premise that the fraudulent conveyance claims did not "implicate the FCC's power to regulate the issuance or use of spectrum licenses," the Circuit Court Decision said:

> This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to insure that spectrum licenses end up in the hands of those most likely to further Congressionally defined objectives. The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor. . . .

Id. at 54. Having so ruled, the Circuit Court Decision went on to say the following:

> This is not to say that [the District Court and Bankruptcy Court] lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors.

Id. at 55. And in footnote 11 on the same page, the Circuit Court Decision said:

> 11. The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave I*, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor,

> but as an allocator of licenses. Such was the case here. . . .

Thus, the Circuit Court Decision "remand[ed] the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary." *Id.* at 62.

Turning to *NextWave II*, the Circuit Court Decision concluded that "NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent." *Id.* at 56.

The Circuit Court Decision agreed with the proposition (quoting from *NextWave IV.A*, 235 B.R. at 290) "that the question of reasonably equivalent value is determined by the 'value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of the debt* which is challenged.'" *Id.*; emphasis in Circuit Court Decision. Accordingly, "[t]he date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable." *Id.* at 56. The Circuit Court Decision framed the issues as follows:

> When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

Id. at 57. The Circuit Court Decision answered the latter question: "We conclude that NextWave bid $4.74 billion for the right -- excluding other bidders -- to be the qualified licensee of the licenses." *Id.* at 57.[2] On this prem-

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[2]This Court ruled in *NextWave II* that NextWave's cash payments and Notes aggregating $4.74 billion were consideration not for the mere *right* to be the qualified licensee, but for the actual C Licenses themselves. In fact, as shown in *NextWave IV.A*, 235 B.R. at 291-93, NextWave's only *ir-*

[Footnote continued on next page]

ise, the Circuit Court Decision held that "NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction." *Id.* at 56.[3]

Confirmation Proceedings

NextWave's First Amended Disclosure Statement was approved by order dated July 27, 1999. Over 99% of all creditors and equity interest holders who submitted ballots voted in support of the debtors' Plan, and a hearing on confirmation of the Plan was scheduled for September 8, 1999. On August 31, 1999 the Court of Appeals granted the FCC's motion for a stay of the confirmation hearing pending appeal.

[Footnote continued from previous page]
revocable financial commitment (its "ticket of admission" to the approval process) at the close of the auctions was the 3% penalty (equating to $142,309,000) under the FCC regulations, 47 C.F.R. § 1.204(g)(2), although its contingent liability was much greater. *See* footnote 3.

[3]In *NextWave II* this Court concluded that, at the close of the C block auctions, NextWave did not incur a *liability* for its $4.74 billion aggregate winning bids -- it incurred a *contingent liability*, necessarily less than $4.7 billion, for penalties including the difference between NextWave's winning bids and the winning bids in a subsequent reauction of the C Licenses. Thus, if the C Licenses had been reauctioned for $4.74 billion or more, the contingent liability could have been reduced to less than 5% of $4.74 billion. Moreover, the issue in the fraudulent conveyance proceeding did not concern a hypothetical, unquantifiable and non-existent contingent liability for penalties; it concerned the value of the consideration actually received by NextWave (the C Licenses) in exchange for its actual cash payments and Notes issued in February 1997 aggregating $4.74 billion.

On December 16, 1999, NextWave filed modifications to the Plan, providing *inter alia* that the debtors would pay all unsecured creditors and the FCC *in full*, regardless of the outcome of the appeal pending in the Circuit Court. The confirmation hearing on NextWave's modified Plan was further adjourned, ultimately to January 21, 2000.

Seeking to persuade the FCC to reach an agreement, NextWave's President wrote to the FCC Chairman on December 29 explaining that under its modified Plan NextWave would pay the FCC, at confirmation, "an amount equal to all principal, and interest accrued to date, plus any applicable late payment fees," and thereafter NextWave "would resume quarterly payments of its $4.3 billion principal and over $1.5 billion interest obligation in accordance with the Commission's schedules, lasting through the Company's PCS license term" (NextWave letter dated December 29, 1999 to the FCC Chairman, Exhibit A annexed to Bevel Declaration).

Continuing its negotiations with the FCC, by letter to the FCC Chairman dated January 11, 2000 and delivered on that date, NextWave proposed

> an arrangement under which NextWave would make a single lump sum payment at confirmation to satisfy its entire obligation [in excess of $4.3 billion] to the FCC. Accelerating all our payments in this manner would eliminate any future installment payments, and would provide the Commission with absolute assurance that it will never have to deal with the issue of collecting any additional license payments from NextWave.

Exhibit B to Bevel Declaration.

The January 12 Declaration

The FCC responded to NextWave's January 11 letter by issuing the January 12 Declaration. This consisted of three documents, all dated and issued January 12: the

FCC's formal objection to NextWave's Modified Plan; a news release bearing the headline "FCC Informs Court That NextWave Licenses Have Cancelled and Sets Date for Auction; " and a Public Notice of "Auction of C and F Block Broad Band PCS Licenses" scheduled for July 26, 2000.

It is important to note that *at no time* prior to the January 12 Declaration did the FCC ever assert the position, or even intimate, that NextWave's C and F Licenses had automatically cancelled in late 1998 or early 1999 or at any other time on account of a default resulting from the passage of some ambiguous deadline for the payment of some unquantified amount in respect of the FCC's pre-petition claims against NextWave. To the contrary, the FCC made repeated declarations in judicial proceedings utterly inconsistent with the notion that NextWave's Licenses automatically cancelled in January 1999, and all three Federal courts which have issued rulings in these proceedings have done so upon the assumption that the licenses were not cancelled.[4]

The Alleged "Default"

The foundation of the January 12 Declaration of cancellation of the Licenses is a "default" by NextWave in its installment obligations under the Notes. The thresh-

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[4]For example, the Court of Appeals said:

> . . . [T]he FCC has not yet sought to take any action vis-a-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow . . . . It is possible that if the FCC chooses to pursue some of these options -- say, collection on the notes -- it may find itself acting as a creditor. (200 F.3d at 59 n.15).

old question is whether there was a "default," in the sense of a legal breach of duty having enforceable legal consequences, as distinguished from a "default" in the colloquial sense of failure to pay timely under some legally suspended, superceded or otherwise unenforceable obligation.

It is, of course, true that there has been a delay in payment of principal and interest under the Notes, and that delay will persist until the debtors' Plan becomes effective, if it ever does. It is also true that past due installments, interest and penalties have not been waived or forgiven and will have to be paid, or the Licenses ultimately will be cancelled. But it does not follow that NextWave's failure to pay timely under the terms of the Notes or the FCC regulations constituted a legal "default" triggering forfeiture of the Licenses.

The alleged "default" is phantom for two quite different reasons.

First, the retroactive declaration of forfeiture for failure to pay an unquantified and possibly unquantifiable amount, within an unspecified and possibly undeterminable deadline, with no prior notice and therefore no opportunity to comply with the obligation (whatever the obligation was) raises serious questions of Constitutional deprivation of property without due process of law. The existence of a default here depends upon an interpretation of the FCC's regulations, because all payments by C and F block licensees were suspended by FCC orders in March and April 1997. As shown in Appendix A to this decision, the FCC regulations concerning resumption of payment obligations are numerous, complex and confusing both as to payment deadlines and amounts due. It appears that the FCC itself is incapable of determining even now, long after the fact, either the date(s) of NextWave's default(s) or the amount(s) then due. It is offensive to due process to make a retroactive declaration of cancellation of property rights based upon a "default" more than a year ago which can-

not be identified either as to date or amount due, of which the debtors had no fair notice and no opportunity to cure.

Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported "regulatory default." The FCA requires notice and an opportunity to be heard where violations touching its regulatory purview warrant the revocation or suspension of a license. *See* 47 U.S.C. § 312 ("Administrative Sanctions" - requiring the FCC to serve an order to show cause on thirty days' notice for station license revocation procedures or cease and desist orders) and 47 U.S.C. § 303 ("Powers of the Commission" - requiring fifteen days' notice and opportunity to request a hearing for actions taken to suspend an operator's license). The Bankruptcy Code also requires, as an element of basic fairness and due process, notice, a hearing and court approval before actions impacting vital interests may be taken. The FCC's reliance upon a purported "regulatory" default, itself premised upon constantly shifting and sometimes inconsistent agency interpretations, only exacerbates the fundamental unfairness of its action. Deprivation of property by agency fiat, without any procedural or due process safeguards, cannot be countenanced.

Second, the debtors' failure to make post-petition payments on the Notes cannot be deemed a legal "default" triggering a forfeiture of the Licenses because such payments were prohibited under the Bankruptcy Code. Even if the FCC regulations suspending the 1997 suspension orders clearly and unambiguously specified payment deadlines and amounts due for C and F block licensees, the payment obligations thus identified were necessarily suspended for the NextWave debtors upon their filing petitions under Chapter 11 on June 8, 1998. As shown in point II, below, the Bankruptcy Code pro-

hibits a debtor from making payments on pre-petition claims to a select creditor or creditors. With exceptions not here applicable, under Section 363 and other provisions of the Code the debtors' property can be used to pay pre-petition claims only pursuant to court order or in the context of a confirmed plan of reorganization. Since a Chapter 11 debtor is precluded from making post-petition payments on a pre-petition claim, NextWave's failure to make payments on the Notes in accordance with a time schedule set by the Notes or by the FCC regulations cannot be deemed a legal "default" triggering automatic cancellation of the Licenses.

The Alleged "Automatic" Cancellation

The FCC's authority for automatic cancellation is 47 C.F.R. § 1.2110(f)(4)(iv), which provides:

> (iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied)

Under the regulation, a "default" must "be declared" before "automatic" cancellation can occur.

The FCC argued that, despite the language "will be declared in default," it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise. As originally promulgated in 1994, the default and cancellation provision read as follows:

> (4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the li-

censee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O.

59 FR 44272-01 at 44298 (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, August 26, 1994) (emphasis supplied). As originally promulgated, it was indeed up to the licensee to actively request a grace period, and there was no requirement that a default be "declared." But this language

was changed to the now applicable "will be declared in default." The FCC never declared a default.

The FCC has argued that the "automatic" cancellation provision is analogous to the regulations in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) and *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591 (10th Cir. 1997), where cancellation involved no action and no exercise of judgment or discretion on the part of the administrative agency. The licenses for airport landing slots in *Gull Air* and taxicab medallions in *Yellow Cab*, by their terms, depended for their continued existence on actual utilization of the landing slots and taxicab medallions and lapsed when no longer used. Thus, termination of the licenses took place with no act, declaration, judgment or discretion exercised or exercisable by the regulatory agency.

The facts are quite different here. Cancellation in this case is not predicated on a "use it or lose it" requirement, but upon delay in payment. The regulation involved requires the FCC to do something (declare a default), and the FCC has the power, in its sole judgment and discretion, to suspend, reinstate and repeatedly change deadlines for payment of C and F block spectrum licenses, both generally and for specific licensees, and to waive payment defaults, and it has repeatedly exercised that power, all as documented in Appendix A.

Moreover, even if the regulation did not require a declaration of default and the FCC did not have discretion to suspend, reinstate, extend and waive payment deadlines, it is still not accurate to say that cancellation is truly "automatic." This is so because, in the real world, unless and until the FCC takes some affirmative action to assert dominion over the licenses of a defaulting licensee, life will go on as before and the parties (including the FCC) will go on spending millions of dollars in litigation costs, DIP lenders will continue lending millions of dollars secured by the licenses, the licensee will continue to expend money in preparation to build out its

PCS systems and the courts will continue to expend countless hours of judicial resources, all on the assumption that the licenses have not cancelled. And that is exactly what happened in this case.

Finally, it is not true that no agency discretion is involved in the cancellation. The Restructuring Orders themselves are replete with agency considerations justifying decisions to either extend or refuse to extend the automatic grace periods. If the FCC has sufficient discretion to suspend payments, extend grace periods and grant waivers in the cases of individual licensees, then the contention that the automatic cancellation provision involves no agency discretion is untenable. The very timing of the January 12 Declaration shows a calculated act designed to divest the debtors of the Licenses immediately after the January 11 letter, and before the January 21 confirmation hearing. The cancellation may be "automatic," but it must nevertheless be invoked. It is that invocation, on January 12, 2000, which is the subject of the debtors' motion.

Discussion

I. The FCC's January 12 Declaration violated the Bankruptcy Code.

The FCA does not preempt the Bankruptcy Code. [5] One cannot point to any language in the FCA that expressly or impliedly purports to limit, abridge or affect the Code insofar as it would apply to the FCC as a creditor. Before turning to the FCC's arguments in opposition, we shall examine the Bankruptcy Code implications of the January 12 Declaration.

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[5] "The FCC makes no claim that the FCA supercedes the Bankruptcy Code." FCC Memorandum in Opposition at 11 ftn. 3.

A. The automatic stay

The automatic stay provided for in Section 362(a) of the Bankruptcy Code is one of the statutory cornerstones of the bankruptcy and reorganization process. It ensures (i) that the assets of a debtor's estate remain intact for adjudication by the Bankruptcy Court and (ii) equality of distribution to creditors in accordance with the priority and distribution scheme of the Code.[6] *See e.g.*, *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989) (Bankruptcy Code "requires that all creditors, both public and private, be subject to the automatic stay"), *cert. denied sub nom.*, *Suffolk County Treasurer v. Barr*, 493 U.S. 1058, 110 S. Ct. 869, 107 L. Ed. 2d 953 (1990). It also ensures that contractual and State or Federal law rights and remedies such as acceleration, forfeiture, imposition of judgment liens and foreclosure will be precluded, held in abeyance or in some cases "cured' and thereby reversed, in order that the ultimate objective of reorganization in Chapter 11 or Chapter 13 for the benefit of all creditors will not be

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[6]The legislative history states:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), U.S. Code Cong. & Admin. News p. 6296, reprinted in Collier on Bankruptcy App. Pt. 4(d)(i); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), U.S. Code Cong. & Admin. News pp. 5840-5841, reprinted in Collier on Bankruptcy App. Pt. 4(e)(i).

thwarted by the action of a single creditor. *In re Monroe Park*, 18 B.R. 790, 791 (Bankr. D. Del. 1982) ("It is clear that Congress intended a financially troubled debtor to be able to reorganize after there has been a default and acceleration even in the face of state law which requires the consent of the creditor for cure and reinstatement once the entire amount has become due.") *See* point I B, below. As noted in *Collier on Bankruptcy*:

> In reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. Secured creditors and judgment creditors might race to seize and sell the debtor's assets in order to obtain satisfaction of their claims, without regard to the interests of other creditors or the value of keeping assets together in an operating business. The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business.

3 *Collier on Bankruptcy* ¶ 362.03[2] at pp. 362-15 (15th Ed. rev. 1999).

The courts in this Circuit hold that any action taken in violation of the automatic stay is void and without force or effect. *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987) ("actions taken in violation of the stay are void and without effect" (quoting *Collier on Bankruptcy*)), *cert. denied*, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1989). *See also Shimer v. Fugazy (In re Fugazy Express, Inc.)*, 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990) ("[s]ince § 362 of the Code stays all enforcement activity automatically, the 1988 FCC letter [purportedly canceling the license] is accordingly without effect" (citing *In re Garnett*, 47 B.R. 170,

171 (Bankr. E.D.N.Y. 1985) ("[t]he action of a party in violation of the stay without court approval is void and without effect"))), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991).

The automatic stay is embodied in 11 U.S.C. § 362(a). Section 362(a) provides as follows, in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of -
>
> (1) the commencement or continuation . . . of a[n] . . . administrative, or other action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to . . . enforce any lien against property of the estate;
>
> (5) any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

All of the quoted subsections of Section 362(a) are implicated by the FCC's issuance of the January 12 Declaration. There can be no question that the FCC's act is claim-based -- the January 12 Declaration of cancellation was explicitly and exclusively predicated upon NextWave's failure to make timely payment of installments due post-petition on the FCC's pre-petition claim

under the Notes. There can be no doubt that the Licenses constitute "property of the estate" under Section 541 of the Bankruptcy Code.[7] The January 12 Declara-

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[7]The FCC has never argued that the licenses are not property of the estate. Section 541 is broadly construed to encompass all conceivable interests of the debtor in property, *United States v. Whiting Pools*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). Although the Circuit Court Decision stated in a different context that a license "does not convey a property right" in the traditional sense (200 F.3d at 51), the law is clear that possessory and intangible interests in general and FCC licenses in particular do constitute property of the estate in bankruptcy. *See e.g., In re Central Arkansas Broadcasting Company*, 68 F.3d 213, 214 (8th Cir. 1995) (interests of debtor in FCC license property of the estate); *In re Tak Communications Inc.*, 985 F.2d 916 (7th Cir. 1993) (same); *In re PBR Communications Systems, Inc.*, 172 B.R. 132, 134 (Bankr. S.D.Fla. 1994) (same); *In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bankr. D. Md. 1992) (same); *Shimer v. Fugazy* (*In re Fugazy Express, Inc.*), 114 B.R. 865, 870-71 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991) (same). Upon the grant of the licenses, the debtors were required to execute not only the Notes but security agreements giving the FCC "a first lien on and continuing security interest in all of the Debtor's rights and interests in the License and all proceeds, profits and products of any sale of or other disposition thereof. . . ." The FCC filed UCC financing statements in several jurisdictions, putting the world on notice of its security interest in the licenses. A "security interest" is an "interest in property obtained pursuant to a security agreement." *Black's Law Dictionary* (6th ed. 1990) at 1357. Uniform Commercial Code § 1-201(37) provides "'Security Interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."

tion implicates subsections (1) and (6), and it unarguably violated subsections (3), (4) and (5).

Accordingly, the January 12 Declaration was void.

B. The right to cure defaults and reinstate obligations to avoid forfeiture and facilitate reorganization

One of the essential objectives of the automatic stay under Section 362(a) is to avoid the effective nullification of other provisions of the Bankruptcy Code designed to facilitate the central Code objective of reorganization, including the right to cure defaults under Sections 1123(a)(5)(G) and 1124(2)(A). Section 1123(a)(5)(G) provides that "a plan shall . . . (5) provide adequate means for the plan's implementation, such as . . . (G) curing or waiving any default." Section 1124(2)(A) expressly contemplates a plan which "(A) cures any such default that occurred before or after the commencement of the case under this title," and this applies "(2) notwithstanding any contractual provision *or applicable law* that entitles" a creditor to demand or receive accelerated payment.

Thus, even if there was a default in the "timely" payment of installments under the Notes, the Bankruptcy Code explicitly provides for the right to cure the default and reinstate the obligation. The "cure," although not defined, is "reversal" of the event that triggered the default and a return to a pre-default status quo. *DiPierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982); *In re Liberty Warehouse Assocs. Ltd. Partnership*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998) ("Under § 1124(2), a debtor can cure its pre-petition default under a note or other debt instrument"). As concisely stated by the Second Circuit, "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified." *Taddeo*, 685 F.2d at 27.

Although *Taddeo* was a Chapter 13 case, its holding applies with equal force in the Chapter 11 context, as the language in both Chapters is substantially similar. *Compare* 11 U.S.C. § 1322(b)(5) (stating that a chapter 13 plan may "provide for the curing of any default within a reasonable time. . . .") *with* 11 U.S.C. § 1123(a)(5) (quoted above) and 11 U.S.C. § 1124(2)(A) (quoted above) and 11 U.S.C. § 1222(B)(5) (stating that a plan may "provide for the curing of any default within a reasonable time. . . ."). Furthermore, the concept of "cure" and/or reinstatement appears throughout the Bankruptcy Code and is globally intended to permit a debtor to put the debt in question back on track and effect a reorganization.. *See* 11 U.S.C. §§ 365(b)(1),[8] 1110(a)(1)(B),[9] 1168(a)(1)(B),[10] and the sections cited and quoted above. This concept and the intent behind it is borne out by the legislative history to Section 1124(2), which states that

> *a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default.* The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. *The holder of a claim or*

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[8]Providing that if there has been a default in an executory contract or unexpired lease, in order to be assumed, the trustee must "cure[] or provide[] adequate assurance that the trustee will promptly cure, such default."

[9]Allowing secured party to take possession of aircraft equipment and vessels unless a default under the security agreement, lease or contract is cured.

[10]Allowing secured party to take possession of rolling stock or accessories thereto unless a default under the security agreement, lease or contract is cured.

> *interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain.* Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978), U.S. Code Cong. & Admin. News p. 5906 (emphasis supplied). "In short, 'curing a default' in Chapter 11 means . . . the event of default is remedied and the consequences are nullified." *Taddeo*, 685 F.2d at 29.

No more dramatic exemplar of the rehabilitative objectives of the "cure" provisions of the Bankruptcy Code could be imagined than this very case. NextWave has proposed in its Modified Plan to pay upon confirmation all amounts accrued and owing to the FCC through the date of confirmation (including installment payments, interest, late charges and penalties), reinstate the payment schedule initially agreed to with the FCC and specified in the Notes, and pay all unsecured creditors, *in full*. If the statutory right to cure were not honored and the FCC were permitted to reclaim NextWave's licenses by retroactive forfeiture, the result would be economic catastrophe for the holders of $627 million of secured and unsecured debts and the probable destruction of any value in NextWave for equity holders who invested $420 million. The FCC itself would forfeit for the public full payment of the entire $4.7 billion bid by NextWave for the C Licenses, plus interest and late fees. Perhaps the FCC speculates it may achieve a greater financial return for the public in the scheduled July 26 auction of NextWave's licenses, but that is an equation expressly forbidden by the governing statute, FCA § 309(j)(7)(A), discussed in point IV, below.

C. The prohibition against discriminatory treatment

For this Court to give legal effect to retroactive cancellation of the Licenses would effectively validate the functional equivalent of an *ipso facto* provision (also referred to as a bankruptcy default provision), which serves to inflict a penalty or forfeiture on a debtor for exercising a Federal right. *Taylor v. Albany Employees Federal Credit Union (In re Taylor)*, 146 B.R. 41, 46-47 (M.D. Ga. 1992) (holding *ipso facto* clauses invalid as a matter of law because they serve to penalize debtors from exercising their federal right to file for bankruptcy), *rev'd on other grounds*, 3 F.3d 1512 (11th Cir. 1993); *Riggs Nat'l Bank of Washington, D.C. v. Perry (In re Perry)*, 29 B.R. 787, 790-91 (D. Md. 1983) (holding that *ipso facto* clauses are unenforceable as a matter of law because they unfairly tip the scale in favor of creditors by effectively granting automatic relief from the automatic stay), *aff'd*, 729 F.2d 982 (4th Cir. 1984); *General Motors Acceptance Corp. v. Rose (In re Rose)*, 21 B.R. 272, 275-79 (Bankr. D. N.J. 1982) ("Enforceability of these clauses would, in effect, render a penalty on debtors." *Id.* at 277). *See also* 7 *Collier on Bankruptcy* ¶ 1124.03[2] at p. 1124-10 (15th Ed. rev. 1999) (stating that Section 1124(a)(2) of the Bankruptcy Code "permits the plan to reinstate the maturity of a claim or interest without curing any defaults with respect to the financial condition of the debtor that are included in the Section 365(b)(2)(A) *ipso facto* clauses. This interpretation of Section 1124(a) is correct").

Section 525(a) of the Bankruptcy Code is a statutory companion of the foregoing principle. Section 525(a) prohibits a governmental unit from revoking a license in retaliation for commencement or prosecution of a bankruptcy case or the alleged nonpayment of a pre-petition claim. The statute provides, in relevant part:

> (a) Except as provided in [not applicable], a governmental unit may not deny, revoke, suspend or

> refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against. . . a person that is or has been a debtor under this title. . . or another person with whom such debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title . . . .

See, e.g., In re Bill, 90 B.R. 651, 658 (Bankr. D. N.J. 1988) (suspending driver's license for failure to pay surcharge violated § 525); *In re The Bible Speaks*, 69 B.R. 368, 373 (Bankr. D. Mass. 1987).[11] It is well recognized that "[t]he prohibition against discrimination based upon the filing of a bankruptcy case necessarily extends to discrimination based upon automatic or likely consequences of such filing." 4 *Collier on Bankruptcy* ¶ 525.02[1] at pp. 525-7.

It appears that the FCC has violated Section 525 in its attempt to retroactively cancel the Licenses. The apparent discrimination is alleged in two forms.

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[11] Stating that:

> It is not consistent with the statute to permit the Board to act based upon a Chapter 11 school's insolvency merely because it takes such action with respect to all schools who are insolvent, whether they are inside or outside of bankruptcy. Such an interpretation preserves the "fresh start" policy of the Bankruptcy Code. It prevents the Debtor's present financial difficulties from being the charter for his future. It also promotes the policy of allowing the Debtor breathing room and a respite from outside pressure.

The Bible Speaks, 69 B.R. at 373 (footnote omitted).

One form is the alleged differences in treatment of NextWave, on the one hand, and other C block and other spectrum license holders, on the other, summarized in the submission of debtors' counsel. To establish this form of discrimination would require discovery proceedings and an evidentiary hearing to afford both sides procedural due process.

The other form of discrimination appears from the facts which are before the Court. After a year of intense litigation the FCC has been vindicated in the Court of Appeals in its contention that a regulatory purpose was implicit in the "full payment requirement" in the FCC regulations. That regulatory objective is fulfilled in the debtors' modified Plan now awaiting a confirmation hearing. It would have been more than fully served under the NextWave proposal of January 11 to pay the entire $4.3 billion outstanding obligation in a lump sum upon confirmation, rather than in installments over the next seven years. As further amplified under point IV, below, the FCC has not and cannot articulate any regulatory interest entailed in the "timely payment" requirement for the modest delay in interest and installment payments to date. The "timely payment" requirement is purely economic (*i.e.*, the time value of money), and the economic consequence of delay will be fully cured by payment in full of all applicable interest, penalties and late fees upon confirmation under the debtor's modified Plan, if the Plan is ever allowed to reach a confirmation hearing and is confirmed.

Lacking any comprehensible regulatory objective, one must consider the consequences of the FCC's January 12 Declaration. As stated by the FCC in its Objection to confirmation, reorganization of NextWave without the Licenses would be impossible, and the debtors' assets would likely be liquidated and sold in Chapter 7. Equity investors could suffer a total loss on their investments aggregating $420 million. Secured and unsecured debt aggregating $627 million might recover a

small percentage. The FCC (or rather, the public fisc) may also suffer economically, perhaps severely. The proposed July 26, 2000 reauction of NextWave's C and F Licenses will be open only to "designated entities" qualified to bid for C and F block spectrum under the FCC's regulations. Designated entities are by definition start-up, entrepreneurial entities and regional telephone companies lacking the financial resources of the major players in the wireless market, such as AT&T, Sprint and Nextel. In the 1999 reauction of predominantly C block spectrum, 34 licenses received no bids, and the rest were sold at values equating to a small fraction of the approximately $4.7 billion plus interest and late fees to be paid by NextWave under its modified Plan.

Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephony is developing at lightning speed, such that another year's delay is of great significance.

These facts would appear to present a clear and convincing *prima facie* case of retaliation in violation of Section 525. However, I am reluctant to make a finding that an agency of the United States Government has acted with *mala fides* in the conduct of its statutory duties without giving the FCC a further opportunity to pre-

sent evidence and argument in support of a good faith, non-retaliatory explanation for its actions and, correspondingly, counsel for NextWave an opportunity to examine into the Agency's motivation through appropriate discovery. Accordingly, I shall not rule upon the debtors' argument under Section 525. In the hope that a ruling may be rendered unnecessary by the course of events, I shall order the parties to desist from further proceedings in respect of Section 525 until one side or the other makes an appropriate request on the record, either orally or in writing, to reopen the issue.

D. The FCC's bankruptcy law contentions

The FCC's contention that the January 12 Declaration did not constitute an "act" violating the automatic stay within the meaning of subsections (3), (4) and (5) of Section 362(a) because the cancellation was "automatic" as of late 1988 or January 1999 does not withstand analysis. As already explained, even if the cancellation were truly "automatic" it would mean nothing unless the FCC did something to "exercise control over," or "enforce [its] lien against" the Licenses. Until the FCC took an affirmative "act" with respect to the Licenses -- the January 12 Declaration -- no one even knew of the putative cancellation, and all parties (including the FCC) and all three Federal courts proceeded upon the assumption that the Licenses were the property of the NextWave estate. The FCC's argument is too facile. A first-time act of dominion over property of the debtors' estate cannot be exempted from the operation of Section 362(a) by an expedient, post hoc assertion that no present act occurred because it all happened "automatically" more than a year ago.

The automatic stay is broadly written and broadly construed. Section 362(a)(3), (4) and (5) stay "*any act*" to obtain possession of, exercise control over, or enforce a lien against, property of the estate. *Delpit v. Commissioner of Internal Revenue Service*, 18 F.3d 768, 771 (9th Cir. 1994) ("[s]ection 362 'is exceedingly broad in

scope' and 'should apply to almost any type of formal or informal action against the debtor or the property of the estate'" (quoting *Collier on Bankruptcy*)). There is no dispute that it applies to the Federal government and its agencies, such as the IRS and the FCC. *Fugazy Express*, 114 B.R. at 872-73 ("at the time of the filing the License was property of the Debtor's estate and had remained so. The FCC was subject to the automatic stay and precluded from rendering any administrative cancellation of the License once the Debtor filed a petition in bankruptcy .... Thus, the License remained property of the estate, even though administratively it became subject to cancellation." *id.* at 873).

Contrary to the FCC's arguments (and the *Gull Air* and *Yellow Cab* decisions, discussed above), there is substantial authority holding that regulatory provisions which interfere with property of a debtor's estate, even by "automatic" operation of the regulation, violate the automatic stay. *See*, *In re American Central Airlines, Inc.*, 52 B.R. 567, 569-571 (Bankr. N.D. Iowa 1985) (stating that, with respect to administrative action to reallocate FAA landing slots, "[t]he mere fact that an interest exists by the grace of government no longer precludes the interest from being treated as a property right," *id.* at 571, and holding that "any act to enforce this [use it or lose it] contractual provision against the Debtor's will constitutes an act to obtain possession of property of the estate and an attempt to exercise control over property of the estate," *id.* at 570 and an "unlawful act" in violation of 11 U.S.C. § 362(a)(3), *id.* at 571). "[R]egulatory provisions in direct conflict with control of the property [of the debtor's estate] by the Bankruptcy Court violate the automatic stay." *In re National Cattle Congress, Inc.*, 179 B.R. 588, 597 (Bankr. N.D. Iowa 1995) (citing *MCorp. Financial Inc. v. Board of Governors of Federal Reserve System*, 502 U.S. 32, 39, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991) and *Missouri v. U.S. Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 479 U.S. 910, 107 S. Ct. 307, 93 L.

Ed. 2d 282 (1986)), *remanded on other grounds*, 91 F.3d 1113 (1996). Under this authority, an FCC regulation effecting automatic cancellation of a debtor's property rights by reason of any default would itself violate the automatic stay.

Furthermore, the term "act" as employed in Section 362 must be broadly construed to include the failure to stop actions that could have been stopped. 3 *Collier on Bankruptcy* ¶ 362.03[8] at 362-63 (15th ed. rev. 1999); *see In re Hellums*, 772 F.2d 379 (7th Cir. 1985); *In re Sucre*, 226 B.R. 340, 347 (Bankr. S.D.N.Y. 1998) (creditor has affirmative duty to discontinue garnishment action). The FCC certainly had the discretionary authority to take any number of actions to avert or delay the purported automatic cancellation (*see* discussion under the heading The Alleged "Automatic" Cancellation, above), including simply not issuing the January 12 Declaration. The FCC's decision to issue the January 12 Declaration was not "automatic."

And, as already noted, but for the FCC's affirmative act in issuing the January 12 Declaration, all parties and the Courts would have proceeded, as they have throughout these proceedings, upon the assumption that the Licenses were not cancelled and remained the property of NextWave. Thus, in the real world it did require an "act" to give effect to the putative automatic cancellation, and that act violated the automatic stay.

Finally, it cannot be overemphasized that the FCC itself has repeatedly acknowledged that the automatic stay applies to the automatic cancellation provisions of its regulations, and that the automatic stay precludes automatic cancellation in the absence of an order of the Bankruptcy Court lifting the stay. No better evidence of this can be found than in the motion to lift the automatic stay which the FCC actually did make in late May 1999, and which was the subject of *NextWave V*. The Memorandum of Law in support of the FCC's Motion to Lift Automatic Stay, dated May 28, 1999, expressly ac-

knowledged that the automatic stay "is currently in place pursuant to 11 U.S.C. § 362(a)" (p. 1) and continued:

> Accordingly, the FCC respectfully submits that "cause" exists under section 362(b)(1) for the Court to lift the automatic stay *so that* the regulations' *automatic cancellation* provisions *may take effect.*

Id. at 2; emphasis supplied. The concluding lines in the FCC's Memorandum state:

> For the reasons stated above, the Court should grant the FCC's motion to lift the automatic stay *so that the Licenses may cancel automatically.*

Id. at 4; emphasis supplied.[12]

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[12]For other judicial acknowledgments by the FCC that a motion would be necessary to revoke or cancel NextWave's Licenses, *see, e.g.*:

> • FCC Memorandum dated in May 1998 in support of motion to disqualify NextWave's counsel, at page 21, footnote 5, referring to "any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses."
>
> • Statements by FCC counsel in arguments before District Judge Parker on November 9, 1998: "During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission" (Tr. 5), and before this Court on November 12, 1998 "The regulations provide that upon failure to make the payments the license is automatically cancelled. *That hasn't (happened) in this case due to the automatic stay*" (Tr. 30, emphasis supplied).

[Footnote continued on next page]

The FCC was correct in May 1999 --Section 362(a) does indeed require a court order lifting the automatic stay before the "automatic cancellation provisions may take effect. . . . so that the Licenses may cancel automatically." No such order was granted in June 1999, and none was sought prior to the January 12 Declaration. Both the January 12 Declaration and the purported automatic retroactive cancellation of the Licenses are violations of the automatic stay.

The FCC's contention that its action was somehow shielded under the "governmental" exception to the automatic stay found in Section 362(b)(4) is not well-founded. Section 362(b)(4) provides:

> (b) The filing of a petition under . . . , does not operate as a stay --
>
> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power

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[Footnote continued from previous page]

> • With respect to the F block licenses, statement by FCC counsel on May 26, 1999 before this Court "There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses. As I understand it, they can comply with their payment obligations, they may well be in a position to reorganize around their F-block property" (Tr. 17).

In interpreting this recently amended provision's exception of the automatic stay to a governmental exercise of "police and regulatory" power, case law developed under former Sections 362(b)(4) and (5) remains as viable guidance. *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 5 at n.6 (Bankr. D. Mass. 1999) citing 3 *Collier on Bankruptcy* ¶ 362.05[5][b] (16th Ed. 1999) and 2 Norton Bankruptcy Law and Practice 2d § 36.18 (1999).

The legislative history of Section 362(b)(4) is instructive as to the meaning of "police and legislative power." The House Report on the 1978 Reform Act states:

> paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-52, reprinted in 1978 U.S.C.C.A.N. 5787, 5838, 5963, 6299. Representative Edwards' and Senator DeConcini's comments further clarify that Section 362(b)(4) must ". . . be given a narrow construction . . . and not . . . apply to actions by a governmental unit *to protect a pecuniary interest in property of the debtor or property of the estate*." P.L. 95-598, 1978 U.S.C.C.A.N. 5787, 6444-45, 6513. (emphasis supplied)

Thus, the test to determine if this narrow exception applies is whether the governmental action is in pursuance of a pecuniary purpose or public policy. *In re Dunbar*, 235 B.R. 465, 471 (9th Cir. BAP 1999). Under

the pecuniary purpose test, Section 362(b)(4) will not except the automatic stay where "government action relates 'primarily to the protection of the government's pecuniary interest in the debtor's property' . . . pursued 'solely to advance a pecuniary interest of the governmental unit.'" *Id.* citing Universal Life Church, Inc., 128 F.3d 1294, 1297, 1299 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S. Ct. 2367, 141 L. Ed. 2d 736 (1998). The public policy test, however, examines whether the governmental action is in furtherance of matters of public policy or merely the adjudication of private rights as between the government and the debtor. *In re Dunbar*, 235 B.R. at 471. ("Where the agency's action affects only the parties immediately involved in the proceedings, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceeding were being conducted in a judicial forum."). *See also*, *In re Fugazy Express, Inc.*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) (retroactive cancellation of license by FCC not shielded by Section 362(b)(4) since action did not impact the health or safety of the public).

Section 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct attempt to enforce its pecuniary interests. The stated premise of the FCC's action is the debtors' post-petition payment default. The FCC has attempted to exercise a self-help remedy for a purely financial default under the guise of a regulatory act. As noted by the Second Circuit in *Fugazy*, which also dealt with a purported FCC automatic retroactive cancellation:

> Nothing in the Code suggests that a party is entitled to engage in "self-help" in derogation of the automatic stay. *See In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir. 1987) ("Judicial toleration of an alternative procedure of self-help and post hoc justification would defeat the purpose of the automatic stay").

In re Fugazy Express. Inc., 982 F.2d at 776.

The FCC acted as a creditor, and as discussed elsewhere in this decision, not in any regulatory capacity. Thus, the FCC's citations to *In re Gull Air, Inc.*, *supra*, and *In re Yellow Cab Co-op. Ass'n*, *supra*, are unpersuasive because these cases consider issues pertaining to regulatory non-use conditions, not vindication of the government's pecuniary interest.

II. There can be no "default" for failure to make a payment precluded under the Bankruptcy Code

At the core of this matter is the FCC's attempt to invoke a self-help remedy for the debtors' post-petition default on a pre-petition claim. The petition date is June 8, 1998. The January 12 Declaration recites "delinquencies" in payment more than 90 days from July 31, 1998, delinquencies clearly falling within the post-petition period and clearly arising from the January 3, 1997 Notes. "A claim is not rendered a post-petition claim simply by the fact that time for payment is triggered by an event that happens after the filing of the petition." *In re Oxford Management, Inc.*, 4 F.3d 1329, 1335 n.7 (5th Cir. 1993).

Any notion of a legally cognizable "default" presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first instance. As a matter of fundamental bankruptcy law, the debtors could not have made post-petition payments on account of this pre-petition claim absent an order of this Court, after notice and a hearing according due process to all affected parties. *See* 11 U.S.C. §§ 102(1) and 363.

Section 363(b)(1) authorizes the debtors, through application of Section 1107(a), to "use, sell, or lease, other than in the ordinary course of business, property of the estate," but only *after* notice and a hearing. "Section 363 is designed to strike [a] balance, allowing a business to continue its daily operations without excessive court

or creditor oversight and protecting secured creditors and others from dissipation of the estate's assets." *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997) citing *In re Roth-American*, 975 F.2d 949, 952 (3d Cir. 1992) and quoting *In re H & S Transportation Co., Inc.*, 115 B.R. 592, 599 (M.D. Tenn. 1990). Section 1108 authorizes the debtors to operate the business, and therefore Section 363(c)(1) allows the debtors "unless the court orders otherwise, . . . [to] enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and [to] use property of the estate in the ordinary course of business without notice or a hearing." *In re Lavigne*, 114 F.3d 379, 384 at n.3; 11 U.S.C. § 363(c)(1).

The debtors' business (recognizing that it is still a start-up company) is "to build and operate [PCS] systems in geographical areas referred to as Basic Trading Areas ('BTAs'), and to provide wireless Internet access and voice services to a broad range of distribution partners." *First Amended Disclosure Statement*, dated July 27, 1999 at 5. Courts commonly apply the "horizontal" and "vertical" test to determine whether a transaction is "ordinary." *See In re Lavigne*, 114 F.3d at 384. But neither test is apposite here. In no way could it have been the ordinary course of NextWave's business to make payments on the $4.7 billion pre-petition claim of the FCC post-petition, even if that claim had not been challenged as a fraudulent conveyance in a hotly contested adversary proceeding. Even ordinary course creditors (such as inventory or parts suppliers, utilities and the like) cannot be paid their pre-petition claims without a court order. It is fundamental in a Chapter 11 case that the pre-petition claims of all creditors, whether coming due pre- or post-petition, get paid only by court order or in accordance with a court-confirmed plan of reorganization. As aptly expressed in *In re H&S Transportation Co., Inc.*:

> Thus, the authorization in § 363 that the trustee may use property of the estate in the "ordinary course of business" without notice or a hearing cannot be construed to permit payments that frustrate the theory and philosophy of the Bankruptcy Code. *Pressman v. Bank of St. Louis (In re J.T.L., Inc.)*, 36 B.R. 860, 862 (Bankr. E.D. Mo. 1984). *See Employee Transfer Corp. v. Grigsby (In re White Motor Co.)*, 831 F.2d 106 (6th Cir. 1987) (does not authorize conversion of prepetition debt to postpetition debt); *Lopa v. Selgar Realty Corp. (In re Selgar Realty Corp.)*, 85 B.R. 235, 240 (Bankr. E.D.N.Y. 1988) (does not authorize sale of primary asset without notice and hearing); . . . *J.T.L.*, 36 B.R. at 862 (does not authorize postpetition payment of interest on prepetition note). Rather, the Court must interpret whether payments were made in the "ordinary course of business" with sensitivity to the Code's overriding policy of maximizing the value of the debtor's estate for the benefit of the creditors.

115 B.R. at 599. Actions which violate Section 363 are "void." *In re Lavigne*, 114 F.3d at 385 (purported cancellation of policy was void as an extraordinary disposition of property of the estate without notice or hearing). Any unauthorized post-petition payments to the FCC on account of its pre-petition claim would be avoidable at the instance of the debtors or other creditors as an unauthorized post-petition transfer under Section 549. *See* 11 U.S.C. § 549(a)(1)(B) ("the trustee may avoid a transfer of property of the estate . . . that occurs after the commencement of the case; and . . . that is not authorized under this title or by the court").

It is senseless to speak of a "default" when, as a matter of bankruptcy law, the debtors had neither the authority nor the ability to make such payments absent notice and court approval. This is not a case where the FCC is entitled to post-petition payments on the Notes

because it has shown that it needs adequate protection of its lien, *see* 11 U.S.C. §§ 361 and 362(d)(1), or that the value of its lien is in any way impaired. The FCC can point to no provision of the Bankruptcy Code that accords it a right to "timely" payment of post-petition delinquencies, such as a commercial landlord may claim under Section 365(d)(3). The FCC must, like other creditors, go through the plan process and have its claim administered under the Bankruptcy Code. The FCC could have applied to this Court to compel NextWave to make post-petition payments. But it did not do so.

Indeed, had the FCC ever made the debtors aware that it stood ready to enforce cancellation of the debtors' principal assets, the debtors could have applied to this Court under Section 363, or possibly even Section 105 under the necessity of payment doctrine, or the debtors could have attempted to arrange DIP financing to pay the amounts and sought approval under Section 364. But the FCC never did so.

The protection due the FCC under the Bankruptcy Code exists in the debtors' Plan. The FCC will be paid in full, the putative "defaults" cured and nullified. No creditor can ask for better protection, in or out of bankruptcy. The FCC cannot stand upon 47 C.F.R. § 1.2110(f)(4)(iv) to suborn Title 11:

> It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations. *See, e.g., Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383, n.** (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevails over inconsistent regulatory language"); *Pacific Gas and Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the statute, is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. Commissioner*

> *of Internal Revenue*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L. Ed. 528 (1936)); *United States v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here").

Furlow v. United States, 55 F. Supp. 2d 360, 364-65 (D. Md. 1999) (Treasury Department regulation impermissibly conflicting with 26 U.S.C. § 151).

There exists a host of protections, not only for the benefit of the debtors, but for the benefit of all constituent parties including the FCC, designed to ensure the rational, systematic and equitable reorganization of this estate. Self-help repossession by ambush is not one of them -- it is repugnant to the very essence of the Bankruptcy Code.

III. The January 12 Declaration of automatic cancellation is barred by the doctrines of equitable estoppel and waiver

The January 12 Declaration and the FCC's position on this motion are confounded by the FCC's prior course of conduct and statements throughout these proceedings. Consider, for example, the following FCC quotations (emphasis supplied in each quotation):

> • As early as July 13, 1998, the FCC argued: "The bankruptcy code also excepts from its automatic stay provisions 'the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.' 11 U.S.C. § 362(b)(4). *Under this provision, however, an agency's enforcement of a final regulatory order against a bankrupt is subject to the automatic stay, and the bankrupt retains its right to challenge any such order in the appropriate forum. See Board of Governors of the Federal Reserve Sys. v. MCorp Financial*, Inc., 502 U.S. 32, 41,

44-45, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991). Thus, despite the necessary dismissal of this adversary proceeding for lack of subject matter jurisdiction, *NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs. See NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992).'"[13]

- Because the FCC provided certain confidential information to WG&M, WG&M should also be disqualified from defending NextWave against *any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses.*[14]

- "Mr. Alter: The motion that is being made by the Federal Communications Commission is not by any means to bar this debtor from getting relief in bankruptcy. *During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission.*"[15]

- "[Mr. Alter]: The regulations provide that upon failure to make the payments the license is *auto-*

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[13]Memorandum of Law in Support of FCC's Motion for Mandatory Withdrawal of the Bankruptcy Court Reference and Dismissal of NextWave's Adversary Proceeding (Adversary Doc. No. 5) (the "Dismissal Memorandum") at 18 n.5.

[14]Memorandum of Law in Support of FCC's Motion to Disqualify Weil Gotshal & Manges as NextWave's Counsel dated July 22, 1998, at 21-22 n.5.

[15]Transcript of Proceedings before the District Court, November 9, 1998, at 5.

matically cancelled. That hasn't (happened) in this case due to the automatic stay . . . . "[16]

- "Mr. Alter: . . . . [T]hey [NextWave] are still quite a substantial company and [*the FCC has] not challenged their payment obligation under the F-block license. There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses.* As I understand it, if they can comply with their payment obligations, they may well be in a position to reorganize around their F-block property.'"[17]

- "[T]he radio spectrum licenses (*the "Licenses"*) issued by the FCC to the NextWave Debtors . . . *would be transferred directly to Nextel* or one or more of its subsidiaries identified by Nextel in its transfer application relating to the Licenses . . . ."[18]

- "To provide the consideration for the transfer of substantially all of *the assets of the NextWave Debtors, including the Licenses*, to Nextel . . . ."[19]

- "The approval of the transfer of *the NextWave Debtors' assets* to Nextel . . . will be submitted to

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[16]Transcript of proceedings before the Bankruptcy Court, November 12, 1998, at 30. The transcript erroneously attributed this quotation to the Court.

[17]Transcript of proceedings before the Bankruptcy Court, May 26, 1999, at 17.

[18]Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization ("Term Sheet") dated August 10, 1999, p 1 at ¶ I(B).

[19]Term Sheet p. 4 at ¶ III(A).

and subject to the approval of the Bankruptcy Court."[20]

• "This letter responds to your letter of September 9, 1999, which requested additional information on the agreement reached between the FCC staff, the Department of Justice ("DOJ") and Nextel on the terms under which the government would support an alternative bankruptcy reorganization plan proposed by Nextel Communications, Inc., ("Nextel") for *the PCS licenses now held by NextWave* Personal Communications, Inc. ("NextWave").

* * *

As reflected in the term sheet, if the bankruptcy court approves the Nextel plan, then the FCC's General Counsel agreed to recommend that the full Commission grant a waiver of the C and F block eligibility rules to allow a transfer of *NextWave's licenses* to Nextel pursuant to a court-approved reorganization plan."[21]

• "The Federal Communications Commission ("FCC") respectfully submits this memorandum of law in support of its motion pursuant to 11 U.S.C. § 362 (d)(1) ("section 362(d)(1)") and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order lifting *the automatic stay* in the above captioned bankruptcy case, *which is currently in place* pursuant to 11 U.S.C. § 362(a).

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[20]Term Sheet p. 6 at ¶ III(D).

[21]Letter dated September 27, 1999 from the FCC Chairman to Representative Tom Bliley.

> Accordingly, the FCC respectfully submits that "cause" exists under section 362(d)(1) for the Court to *lift the automatic stay so that the regulations' automatic cancellation provisions may take effect*."[22]

Aside from these and many other similar oral and written statements by the FCC, the FCC's entire course of conduct (*i.e.*, what the government did, and did not do) right up to the January 12 Declaration is consistent with only one set of assumptions: NextWave "would enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs"; the automatic stay would "hold the creditors at bay, including the [FCC]"; the automatic stay, "currently in place," precluded the automatic cancellation of NextWave's licenses without prior application to the Bankruptcy Court; NextWave continues to hold the licenses as part of its assets which the FCC negotiated to transfer to Nextel under a "Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization."

All parties in interest, *including the FCC*, conducted themselves in a way which clearly demonstrated reliance upon these assumptions. Consider the following:

- Nearly $10 million has been expended by lawyers and other professionals for the parties (not including the FCC).
- NextWave engaged in an entire trial of and subsequent appeals in the Adversary Proceeding (including to the Second Circuit).

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[22]May 28, 1999 Memorandum of Law in Support of FCC's Motion to Lift Automatic Stay at 1-2.

- Approval of the Disclosure Statement, solicitation of creditors, the original scheduling of confirmation and its stay by the Second Circuit took place.

- DIP Lenders have extended $35 million credit secured by assets including the F Licenses relying upon prior representations and conduct of the FCC.

- The Official Creditor's Committee, which represents more than $500 million of creditors "relied extensively upon those representations [by the FCC] in conducting itself in these cases. The Committee represents that had it any inkling that the FCC viewed the licenses as subject to automatic cancellation for non-payment, it would certainly have sought judicial determination of this issue before the first payment was past due.[23]

- "Had the Debtors and their creditors known that they would forfeit almost $500 million in License downpayments and the Licenses, thus wiping out any chance for recovery on the hundreds of millions in claims, by failing to make interest payments on pre-petition debt in bankruptcy, they would have made every effort to come up with the money while the reorganization effort continued".[24]

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[23]Statement of the Official Creditor's Committee in Support of, and Joinder in, Order to Show Cause Against FCC for Enforcement of the Automatic Stay with Respect to the Debtor's C and F Block Licenses, 4 at ¶ 7.

[24]Debtor's Reply Brief in Support of Order to Show Cause Against the FCC for Enforcement of the Automatic Stay with Respect to the Debtors' C and F Block Licenses ("Debtor's Reply Brief') at 27.

- Extensive litigation with Nextel, some of which remains pending, resulted from the Term Sheet between Nextel and the FCC looking to the transfer of NextWave's Licenses to Nextel.

While courts have expressed reluctance to apply the doctrine of equitable estoppel to government in situations where government is acting in its sovereign capacity, the same rationale does not hold where, as here, government is acting in a commercial capacity. For example, in *Federal Deposit Insurance Corp. v. Sarandon*, Case No. 91 Civ. 5109, 1992 WL 36132 (S.D.N.Y. Feb. 19, 1992), the court made this distinction clear:

> The rule of no estoppel against the government, as articulated in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10 (1947), may be better described as a rule of no estoppel against the government when the government acts in its sovereign capacity rather than in a commercial capacity. When the FDIC sues to collect on a promissory note it is acting in a commercial and not in a sovereign capacity, and should be as vulnerable as any other litigant to principles of estoppel when it acts in a fashion that prejudices private citizens.

Similarly, the court in *Federal Deposit Insurance Corp. v. Harrison*, 735 F.2d 408 (11th Cir. 1984), found that the FDIC was acting as a commercial creditor in its efforts to collect payment on certain notes and stated:

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's

activities are analogous to those of a private concern.

As stated by the Supreme Court in *Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L. Ed. 618 (1879):

> The estoppel here relied upon is known as an equitable or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied to promote the ends of justice . . . . It accomplishes that which ought to be done between man and man . . . .

The FCC argues that estoppel may apply to the government "only in those limited cases where the party can establish both that the Government made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct," citing *Drozd v. I.N.S.*, 155 F.3d 81, 90 (2d Cir. 1998) and *City of New York v. Shalala*, 34 F.3d 1161 (2d Cir. 1994). However, these cases are readily distinguishable in that the plaintiffs there sought to estop government agencies from acting in their regulatory capacity. Where the government acts in a commercial capacity, as in the instant case, equitable estoppel is appropriate with or without findings of misrepresentation.

Indeed, the notion of "misconduct" is beside the point. What is important here is that the FCC acted one way for more than a year, and parties spent or loaned millions assuming that it meant what it said. Reliance was both reasonable and inevitable. Equitable estoppel

will operate to prevent irrevocable harm from such a radical change of position as the January 12 Declaration.

As to waiver, "bankruptcy courts as courts of equity, should look with disfavor on contract forfeitures, especially if forfeiture would imperil a debtor's reorganization efforts. There is a tendency to overlook a failure to comply strictly with the terms of a contract when the parties by their conduct, have tolerated deviations in performance." *See In re Photo Promotion Assocs., Inc.*, 45 B.R. 878, 882 (S.D.N.Y. 1985).

The law recognizes that the government, like any other contracting party, must give reasonable notice of any new compliance schedule if it chooses to unilaterally impose such a schedule. *See, e.g., Bailey Specialized Bldgs., Inc. v. United States*, 186 Ct. Cl. 71, 404 F.2d 355, 359 (1968).[25] Such a waiver by one with authority will estop the government and the requirement cannot be suddenly revived to the prejudice of a party who has changed his position in reliance on the supposed suspension. *Gresham & Co. v. United States*, 200 Ct. Cl. 97, 470 F.2d 542, 555 (1972). *See also Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662, 688 (1994).

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[25]*See also* Glen T. Carberry & Phillip M. Johnstone, *Waiver of the Government's Right to Terminate For Default In Government Defense Contracts*, 17 PUB. CONT. L.J. 470, 478-81 (1988). In addition, implied waiver can occur when there is (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on failure to terminate and continued performance by him under the contract, with the government's knowledge and express or implied consent. *See DeVito v. United States*, 188 Ct. Cl. 979, 413 F.2d 1147, 1154 (1969).

In recognizing that waivers are applicable against the government, the D.C. Circuit has held that where, as here

> a government official has authority to waive the regulations allegedly violated [pursuant to its discretionary authority], "we look instead to the standards of waiver that would govern between private parties.". . . Thus when, in the course of making an agreement, an official with power to waive a regulation that would bar the agreement acts in a way that signals to a private party an objective intent to waive the regulation, and the private party relies on that behavior, the government official is estopped from voiding the agreement on the basis of the regulation.

Cinciarelli v. Reagan, 729 F.2d 801, 807-08 (D.C. Cir. 1984) (emphasis added). *Branch Banking & Trust Co. v. United States*, 120 Ct. Cl. 72, 98 F. Supp. 757, 766, *cert. denied*, 342 U.S. 893, 72 S. Ct. 200, 96 L. Ed. 669 (1951).

The FCC has the power and discretion to waive timely payment. The FCC acted in a way which said expressly and by implication that payments were suspended during NextWave's Chapter 11. NextWave and other parties acted in reliance.

It has been held that the FCC must consider the impact of its actions upon innocent creditors in assessing public interest with respect to FCC licenses. *Second Thursday Corp.*, 22 F.C.C.2d 515, 516 (1970); *LaRose v. FCC*, 494 F.2d 1145, 1146 & n.6 (D.C. Cir. 1974) ("[a]dministrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest"). In the present case, a decision to declare that the debtors' licenses were automatically cancelled one year ago, in the face of prospective full pay-

ment and immediate deployment, arbitrarily leaves the creditors and shareholders of these estates -- representing $1.047 billion of claims -- with little if any chance for recovery.

On the undisputed facts, the FCC has waived its "timely payment" requirement. Ultimately, NextWave must comply with the "payment in full" requirement, or the Licenses will be cancelled. But the debtors must be granted due process and their day in court under the Bankruptcy Code and a fair opportunity to pay their debt to the FCC in a confirmed Plan.

IV. No regulatory purpose countenanced by the governing statute is served by the "timely payment" requirement

The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.[26]

What has been completely overlooked in the FCC's regulatory aspect contentions is that they conflict with the spirit and the letter of the agency's governing statute.

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[26] If the "timely payment" requirement served a *bona fide* regulatory objective, one must wonder what was the impact on that objective of the FCC's March and April 1997 orders indefinitely suspending all payments for C and F block licensees, the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines, and the FCC's repeated grant of waivers of payment defaults by other spectrum licensees. And how does that impact differ from the impact of the NextWave delay in payment?

The FCA does not mandate that the FCC should seek to extract maximum consideration for PCS licenses. To the contrary, Congress has specified as one of four basic objectives of spectrum auctions "(C) recovery for the public of *a portion of* the value of the public spectrum resource." 47 U.S.C. § 309(j)(3)(C). The statute goes further and expressly precludes the FCC from basing regulatory determinations on revenue considerations. FCA § 309(j)(7)(A) and (B), under the heading "Consideration of revenues in public interest determinations," provides as follows:

> **(A) Consideration prohibited**
>
> In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.
>
> **(B) Consideration limited**
>
> In prescribing regulations pursuant to paragraph *(4)(A)* of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.

47 U.S.C. § 309(j)(7)(A), (B); emphasis supplied.[27]

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[27]The words "public interest," "convenience" and "necessity" obviously refer to the FCC's regulatory jurisdiction.

Paragraph (7)(A) applies to the FCC in its function of assigning or allocating spectrum, and it prohibits the FCC from exercising that regulatory function based on "the expectation of Federal revenues."

Paragraph (7)(B) governs the FCC in prescribing regulations pursuant to paragraph (4)(A). Paragraph (4)(A) provides as follows:

> **(4) Contents of regulations**
>
> In prescribing regulations pursuant to paragraph (3), the Commission *shall* - -
>
> (A) consider *alternative payment schedules* and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, *or other schedules* or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

47 U.S.C. § 309(j)(4)(A); emphasis supplied.

Thus, Congress has ordered the FCC in Section 309(j)(4)(A) to "consider alternative payment schedules" to accomplish the legislative objectives, while in Section 309(j)(7)(B) Congress specifically prohibited the FCC from prescribing such regulations having a regulatory purpose "solely or predominantly on the expectation of Federal revenues." Certainly the statute contemplates that the FCC prescribe regulations respecting the installment payments called for by the legislation. But Congress has made clear that the expectation of revenue, *i.e.*, debtor-creditor economics, may not inform the FCC's regulatory equation. Precisely the same issue has arisen in the context of Section 362(b)(4) of the Bankruptcy Code, and the courts have uniformly drawn the distinction between administrative proceedings or actions that are regulatory in nature and those that are purely economic. *See* discussion under point I.D, above.

The FCC is bound by the statute from which it derives its jurisdiction. "It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations." *Furlow v. United States*, 55 F. Supp. 2d 360, 364 (D. Md. 1999); *Caldera v. J.S. Alberici Const. Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"); *Bukala v. U.S.*, 854 F.2d 201, 203 (7th Cir. 1988) ("an agency's interpretation of a statute . . . , cannot supersede statutory language"); *Johnson v. Heckler*, 769 F.2d 1202, 1212 (7th Cir. 1985); *Pacific and Gas Elec. Co. v. U.S.*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the statute is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. C.I.R.*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L. Ed. 528 (1936); *U.S. v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981) ("whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here"). Nor can the FCC's regulations override the Bankruptcy Code. *United States v. Shumway*, 199 F.3d 1093, 1104-05 (9th Cir. 1999); *Freeman v. City of Mobile*, 193 F.3d 1179 (11th Cir. 1999) (agency cannot amend or supplant an act of the legislature).

Finally, one must ask whether there is any regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar the jurisdiction of the Bankruptcy Court from enforcing the Code. What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses?

How does the January 12 Declaration coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues?"

The FCC cannot, either by its regulations or its interpretation of its regulations, supervene either the Federal Communications Act or the Federal Bankruptcy Code. Where those regulations or the agency's interpretation thereof conflict with either the FCA or the Bankruptcy Code, the will of Congress as expressed in the statutes must prevail.

V. The Circuit Court Decision does not address the issues presented on this motion

Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.

The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses (*see* footnote 4, above).

The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for

obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's failure to make post-petition payments on its pre-petition claims.

Conclusion

For the foregoing reasons, the debtors' motion is granted. Counsel for NextWave will prepare forthwith an order consistent with this decision, fax it to counsel for the FCC for approval as to form (without prejudice to appeal) and submit it to this Court.

In accordance with the Court of Appeals' order of January 24, 2000, ruling upon the FCC's "Emergency Motion for a Stay of Bankruptcy Court Proceedings and Leave to File a Mandamus Petition," confirmation of any Plan of reorganization is stayed pending further order of the Court of Appeals. This Court admonishes the parties to cooperate in seeking expedited review on appeal in order that these Chapter 11 cases may be brought to a conclusion without unnecessary prejudice to the debtors' estates and the public interest entailed in further delay.

APPENDIX A

The Alleged "Default"

The FCC maintains that the debtors' Licenses automatically and retroactively ceased to exist at some point in late 1998 or January 1999 as a result of a "default" by NextWave citing 47 C.F.R. § 1.2110(f)(4)(iv).[28] Yet the FCC cannot answer the most basic question as to the date of the default, the amount of the default, or the documents which might have apprised the debtors of the then impending default and forfeiture. As shown below, the answers to these questions are completely unclear.

Notice of the Alleged Default

The first issue, reading from 47 C.F.R. § 1.2110(f)(4)(iv), is whether the debtors were ever given any notice of a default, because some form of notice of default, at the very least a declaration, is required by the phrase "will be declared in default."

At argument the FCC was extensively questioned as to whether any notice of default was given. Conceding that no notice was given to the debtors other than the January 12 Declaration, the FCC instead argued that it had published policy statements in its record which constructively gave notice of default and automatic cancellation under 47 C.F.R. § 1.2110(f)(4)(iv). (These published statements are addressed below.)

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[28]Subsection (iv) provides:

Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied).

Moreover, the FCC also maintained that it was not required to specifically notify the debtor of the default, that under the regulation default occurred automatically despite the language "will be declared in default," and that it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The FCC did, however, give other parties notice of their payment defaults.[29] The FCC did not do so in this case. Its argument that the January 12 Declaration served as notice of default is little better than a post hoc rationalization for the failure to provide the same notice to the debtor it extended to other licensees. The fact is that the FCC simply ignored 47 C.F.R. § 1.2110(f)(4)(iv)'s direction that a default "will be declared."

The Date of the Alleged Default

The FCC is unable to specify a date for the debtors' alleged default. The FCC's position in its objection to confirmation and in its brief is that a default occurred

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[29] *See e.g., In re Roberts-Roberts & Assocs.*, 12 F.C.C.R. 1825, 1997 WL 43121 (Feb. 4, 1997) (granting waiver of downpayment rules for incorrect payment after notice of delinquency issued); *In re Southern Communications Systems, Inc.*, 12 F.C.C.R. 1532, 1997 WL 43127 (Feb. 4, 1997) (waiver of late payment default where payment made one day late and upon notice of delinquency); *In re Longstreet Communications Int'l., Inc.*, 12 F.C.C.R. 1549, 1997 WL 43114 (Feb. 4, 1997) (waiver of late payment default where payment made nine days late and upon notice of delinquency); *In re RFW, Inc.*, 12 F.C.C.R. 1536, 1997 WL 43097 (1997) (waiver of late payment default where payment made six days late and upon notice of delinquency); *In re Wireless Telecommunications Co.*, 12 F.C.C.R. 1544 (Feb. 4, 1997) (waiver of late payment default where payment made two days late and upon notice of delinquency).

sometime (variously) in late 1998 or January 1999, while the January 12 Declaration only recites a delinquency more than 90 days after July 31, 1998. The FCC relies on the provisions of the installment payment "Restructuring Orders" to support its vague assertion of a default date at some point in January 1999.

To appreciate these Restructuring Orders, some history of the regulatory sequence is necessary. On March 31, 1997, the FCC issued an order which suspended the installment payment obligations of C block licensees "until further notice," although interest continued to accrue during the suspension. *In the Matter of Installment Payments for PCS Licenses*, 12 F.C.C.R. 17325, 1997 WL 144207 (1997). A corresponding suspension was issued for F block licensees on April 28, 1997.

The suspension was lifted in a September 25, 1997 "restructuring" order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees*, 12 F.C.C.R. 16436, (Sept. 25, 1997) (the "First Restructuring Order"), and modified in two subsequent orders, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees*, 13 F.C.C.R. 8345, 1998 WL 130176 (March 23, 1998) (the "Second Restructuring Order"), and *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees*, 14 F.C.C.R. 6571, 1999 WL 183822 (March 31, 1999) (the "Third Restructuring Order", collectively the three are referred to as the "Restructuring Orders"). The First Restructuring Order instituted the resumption of installment payments for C and F block licensees as of March 31, 1998 and instituted an automatic 60-day grace period (payment date of May 30, 1998). 12 F.C.C.R. 16436 at ¶ 25. The First Restructuring Order

further set out three options to resumption of payments originally due for C block licenses, with an election to be made by June 8, 1998. The Second Restructuring Order modified the options available to C block licensees, changed the automatic 60-day grace period to a 90-day period, and reset the payment resumption date from March 31, 1998 to a date 90 days after publication of the Second Restructuring Order in the Federal Register, with a 5% late payment fee due for amounts paid within this period. 13 F.C.C.R. 8345 at ¶¶ 6, 15. The Third Restructuring Order did not alter these due dates.

In a confusing series of rulings, the FCC delayed the issuance of a final installment payment resumption date, finally setting it for July 31, 1998. 13 F.C.C.R. 7413, 1998 WL 180790 (April 17, 1998) ("Installment payments for broadband PCS C and F block licensees will resume on July 31, 1998. On that date, licensees are required to pay accrued interest from April 1, 1998, through and including July 31, 1998, plus one-eighth of their Suspension Interest. Payments received after July 31, 1998, but on or before October 29, 1998, must include a late payment fee equal to 5% of the amount that was due on July 31, 1998.").

In the meantime, amendments to 47 C.F.R § 1.2110 became effective on March 16, 1998 which both modified and incorporated some of the terms of the First and Second Restructuring Orders. However, the FCC only released an interpretive guidance document some six months later in the September 18, 1998 *Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules*, 13 F.C.C.R. 18213, 1998 WL 639381 (September 18, 1998) (the "Guidance Notice"). The Guidance Notice instructs:

> The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a

late fee equal to 5 percent of the missed installment payment ("late fee"). *If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period ("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed.* Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.

Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the non-delinquency period or grace period. Payments made during a non-delinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treas-

ury for collection subject to the Debt Collection Improvement Act of 1996.

Payment due dates for missed installment payments and accompanying late fee(s) are independent of the regular installment payment schedules. Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fee(s) may be due before the next quarterly installment payment. Payments of missed installment payments and accompanying late fee(s) must be made simultaneously and in a timely manner. Partial payments will not be sufficient to avoid default. (emphasis supplied)

According to the Guidance Notice, the operative grace period for installment payments should be 180 days from the modified resumption date (July 31, 1998), or January 28, 1999. However, the Guidance Notice was not released until well after the April 17 revision of the resumption date to July 31, 1998. Assuming that a licensee would have found this public notice, any licensee in September of 1998 would have faced interpretive guidance relating to a potential default date of July 31, 1998, established five months earlier on April 17 and extending the previous due date of March 31 which itself was established on March 23 in the Second Restructuring Order, only to find himself within a grace period extending until October 28 (then only a month or so away), which was established by implication on March 16 in the amendments to 47 C.F.R. § 1.2110 and could only be determined with reference to the April 17 order, with a possible second grace period assessing a doubled penalty rate to run for an additional 90 days.

Of course, the foregoing analysis may not accord with the FCC's contemporaneous or post hoc interpretations of its regulations, or indeed possibly some other regulations this Court has not found, even after its own diligent computer search through the often vague and conflicting flotsam of FCC releases.

It certainly does not accord with the representations made to this Court by the FCC. The FCC in its memorandum claims October 31, 1998 as the deadline, citing to *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment for Personal Communications Services (PCS) Licenses, Order on Consideration of Second Report and Order*, 13 F.C.C.R. 8345 at ¶¶ 15, 21-30, 1998 WL 130176 (March 24, 1998). Yet, this date is completely inconsistent, from this Court's reading, with the later-issued Guidance Notice. The only thing that is clear is that, whatever the putative default date was, it was a moving target. As daunting as it has been for this Court to attempt to reconstruct this sequence well after the fact, it would have been beyond perplexing for a licensee at the time to fix any reasonable notion of what obligation was due when.

Not surprisingly, in this contested matter the FCC has been unable to articulate any date upon which the debtor's installment obligations were due, even noting that their calculation of January 1999 was in part informed by the 60-day extension provision of Bankruptcy Code Section 108. Subtracting 60 days from January 1999 results in some date in November 1998, for which no support exists in the regulations. Add to this the fact that the debtor filed its petition in June of 1998, in the midst of miasma of conflicting, shifting deadline amendments, and there is little surprise that FCC counsel at the hearing was able to identify a date certain for a default.

Even assuming, say, that January 28, 1999 were the correct date for the expiration of any applicable grace period, it does not follow that a "default" occurred.

Payment obligations were suspended until July 31, 1998, but the debtors filed their petition on June 8, 1998. Thus the suspension was in effect when the debtor commenced this case. No obligation was then due. Under the grace period regulations, no obligation would have been due, this Court assumes in the absence of any other cogent explanation, until January 28, 1999. The FCC's claimed default date calculation, which falls sometime in either of October or November 1998 excluding any effect of Section 108, is utterly inconsistent with its guidance documents which would have putatively granted grace periods until January 28, 1999. If that is indeed the FCC's "rough" calculation, the debtors cannot have been in default when the FCC claims it to have been. The debtors' obligations on the Notes were incurred as of January 3, 1997 (but executed on February 19, 1997). The March 31, 1997 suspension order suspended any installment payment obligations and they were not resumed until July 31, 1998 (at the earliest, although interest continued to accrue). Thus, the putative default amounts, if indeed they can be calculated, were entirely post-petition. The legal effect of any putative default or automatic cancellation issuing in the post-petition period is discussed in the main body of this decision.

The Amount of the Alleged Default

What was the amount of the debtor's alleged default in late 1998 or January 1999? There is no answer.

The only documentation of what might have been due, contained in a supplemental submission by the FCC, is a statement to NextWave dated May 26, 1998 of total interest due of $2,474,901.66 for payments comprising five payments due from 4/30/97 through 3/31/98. How these payments could have been "due" as of May 26, 1998 while the various suspensions and grace periods were in effect is not at all clear, especially in light of the April 17, 1998 extension of the resumption date to July 31, 1998.

The Restructuring Orders, the March 16, 1998 *amendment to* 47 C.F.R. § 1.2110 *and the Guidance* Notice do give some guidance as to method of calculation, but the guidance is hopelessly complex and confusing. *See* First Restructuring Order ¶¶ 25-27, (requiring "all payments due and owing on and after March 31, 1998 be made in accordance with the terms of the licensee's Note, associated Security Agreement, and the Commission orders and regulations," with all interest accrued over the suspension period becoming due and payable over a two-year period in one-eighth of the amount of suspension period interest payable with each regular installment payment until paid). As to regular installment payments, the First Restructuring order provides:

> We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment due dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998 will be prorated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on June 30, 1998, and will include the amount of interest accrued

> from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest. All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

Id. at ¶ 27. The Second Restructuring Order made the following changes:

> . . . we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date. As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments. Although we stated in the Second Report and Order that a shorter non-delinquency period was justified in light of the one-year payment suspension, we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments . . . . Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted. . . . Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period. Subsequent payments, due

> after the initial resumption payment, will be subject to the rules adopted in the Part I Third Report and Order.[30]
>
> 27. Under this plan, the Suspension Period (as defined in the Second Report and Order) will still end on March 31, 1998. All interest accrued from the date of license grant through March 31, 1998, (*i.e.*, Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. . . . In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

Second Restructuring Order at ¶¶ 25-27. The March 16 amendments to 47 C.F.R. § 1.2110, as articulated in the Guidance Notice, issued only well after the extended resumption date of July 31, 1998, once again changed the grace periods along with any applicable charges:

> The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a late fee equal to 5 percent of the missed installment payment ("late fee"). If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period

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[30]This refers to the March 16, 1998 amendments to 47 C.F.R. § 1.2110, 63 FR 2315.

("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed. Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.

Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the non-delinquency period or grace period. Payments made during a non-delinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Guidance Notice, *supra*. Moreover, the Guidance Notice stated:

Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fee(s) may be due before the next quarterly installment payment.

Id. In other words, although suspension period interest was to be paid along with regular installment payments (when the obligation resumed, but upon which date is not altogether clear), *see* the quoted provisions of the Restructuring Orders, *supra*, the Guidance Notice appears to say that some payments may have been due before others.

Reading through this sequence of FCC pronouncements, one is unable to divine how to calculate what payment would have been due, even assuming that a default date could be determined, which is itself problematic. It is also unclear whether the statement in the Second Reconsideration Order (dated March 24, 1998) that "there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period" conflicts with the March 16 amendments to 47 C.F.R. § 1.2110 (*see* 63 FR 2315 at 2346), as announced in the September 18, 1998 Guidance Notice, providing for an second automatic grace period, particularly given that the resumption date was reset to July 31, 1998.

Moreover, and significantly, since the FCC cannot determine the amount due, then it can hardly satisfy the necessary precondition of 47 C.F.R. § 1.2110(f)(4)(iv) that "[a]ny eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period. . . ." There is no calculus of what amounts were due, and no way to determine on a given date whether any late fee, interest payment, interest or principal in fact was due, or whether the alleged default was attributable to late fees, interest or principal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 1999

(Argued: November 1, 1999 Decided: December 22, 1999)

Docket No. 99-5063

In Re: NEXTWAVE PERSONAL COMMUNICATIONS, INC.

Debtor.

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

- v -

NEXTWAVE PERSONAL COMMUNICATIONS, INC.,

Appellee.

Before: McLAUGHLIN, JACOBS and SACK,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*) affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New York (Adlai S. Hardin, *Bankruptcy Judge*) rendered in the adversary proceeding of NextWave Personal Communications, Inc. against the Federal Communications Commission. The district and bankruptcy courts exceeded their jurisdiction by in effect intervening in the allocation of radio spectrum licenses and misconstrued the nature of the Appellee's financial obligations under the Federal Communications Commission's spectrum auction rules. Accordingly, we

reverse the judgment of the district court affirming the orders of the bankruptcy court and remand for further proceedings consistent with this opinion, if any are necessary.

DANIEL S. ALTER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York and Gideon A. Schor, Assistant United States Attorney, Of Counsel), *for Appellant.*

DEBORAH L. SCHRIER-RAPE, Andrews & Kurth L.L.P., Dallas, TX (Gregory H. Bevel, Michelle V. Larson and James P. Muenker, Of Counsel), *for Appellee.*

David M. Friedman, Kasowitz, Benson, Torres & Friedman L.L.P., New York, NY, *for amicus curiae Official Committee of Unsecured Creditors.*

Anthony A. Dean, Windels, Marx, Davies & Ives, New York, NY (Charles E. Simpson, Of Counsel), *for amicus curiae Urban Comm-North Carolina, Inc.*

PER CURIAM:

The Federal Communications Commission (the "FCC") appeals from an order of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB) (S.D.N.Y. July 27, 1999), affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New York (Adlai S. Hardin, Bankruptcy Judge).[1] On November 24, 1999, we issued an

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[1] *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision

[Footnote continued on next page]

order reversing the judgment of the district court and remanding the case for further proceedings, with an opinion to follow. This is that opinion.

In pertinent part, the decisions and orders of the bankruptcy court, affirmed by the district court judgment from which the FCC appeals, held that the FCC's grant to NextWave Personal communications, Inc. ("NextWave") of sixty-three radio spectrum licenses for which NextWave had been the high bidder at the FCC's 1995-96 C-Block" auction (the "Licensees") was a constructively fraudulent conveyance for purposes of 11 U.S.C. § 544 ("§ 544"). *See NextWave* IV.A, 235 B.R.

[Footnote continued from previous page]
denying motion to lift automatic stay) (*NextWave* V); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999) (May 12, 1999 decision on fraudulent conveyance claim) (*NextWave* IV.A) as supplemented by *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 305 (Bankr. S.D.N.Y. 1999) (June 22, 1999 decision on remedy) (*NextWave* IV.B); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of FCC's motion to dismiss) (*NextWave* III); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to FCC and granting to debtor partial summary judgment with regard to date upon which obligations were incurred) (*NextWave* II); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 263 *(In re NextWave Personal Communications, Inc.)*, 235 B.R. 263 (Bankr. S.D.N.Y. 1998) (Dec. 7, 1998 decision granting in part and denying in part FCC's motion to dismiss) (*NextWave* I).

at 304. The bankruptcy court therefore avoided $3.7 billion of NextWave's $4.74 billion obligation to the FCC, allowing NextWave to keep the Licenses while it reorganized in bankruptcy. *See NextWave* IV.B, 235 B.R. 305. We hold that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the Licences were fraudulently conveyed by failing to defer to the FCC's interpretation of its own regulations when determining the point at which NextWave's obligations were incurred for § 544 purposes. We therefore reverse the judgment of the district court affirming the orders of the bankruptcy court and remand the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary.

BACKGROUND

In 1993 Congress passed several amendments to the Federal Communications Act (the "FCA"), one of which added § 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002 (a), 107 Stat. 312, 387 (1993). Section 309(j) authorized the FCC to conduct competitive bidding auctions for radio spectrum licenses. The FCC was instructed to ensure that as part of its auction plan certain blocks of spectrum would be reserved for qualified entities, including small businesses, and that deferred payment plans on favorable terms would be available to them. *See* 47 U.S.C. § 309(j)(3)(B), (j)(4)(D) . Pursuant to these instructions, the FCC reserved a block of 493 licenses known as the "C-block licenses" for the use of qualified entities providing "personal communications services," an emerging form of wireless communications technology.

On May 6 and July 16, 1996, the FCC concluded two sets of C-block auctions, which produced some ninety

successful bidders.[2] NextWave, a startup company established to take advantage of the opportunities created by § 309(j), was the high bidder for sixty-three C-block licenses. Its aggregate winning bids amounted to $4.74 billion.

Pursuant to the FCC regulations issued under § 309(j), winning bidders that were "small businesses" were required to pay only ten percent of their winning bids in cash; the remaining ninety percent could be paid in installments over a ten-year period at below market interest rates. 47 C.F.R. § 24.711(b)(3). NextWave made the required five percent down payment on the Licenses when it was announced as the high bidder on them in the summer of 1996,[3] and subsequently deposited another five percent with the FCC on January 9, 1997, immediately after its application for the Licenses was conditionally approved.

The four-month gap between those two dates resulted from the FCC's auction rules under which a winning bid did not automatically trigger the grant of the

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[2]The C-block auctions ending July 16 involved licenses that became available when high bidders from the first auction defaulted on their initial down payments.

[3]As part of the FCC's auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. NextWave deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. On May 6, 1996 it was declared the winner of 56 of the Licenses, for which it deposited an additional $130,834,333 with the FCC. On July 16 it was named the winner of an additional seven Licenses, for which it deposited $20,138,825 on July 23. At the close of the bidding process, it had therefore deposited a total of $237,182,402, or approximately five percent of its winning bids, with the FCC. *See NextWave* II, 235 B.R. at 273.

license or licenses in question. A winning bidder was required to submit a "long form" application, and the grant of a winning bidder's licenses was conditioned upon that bidder's ability to demonstrate through its application that it was in compliance with FCC regulations and statutory requirements. While over ninety percent of the winning bidders at the C-block auctions were granted their licenses on September 17, 1996, NextWave's ownership structure, specifically its allegedly impermissibly high percentage of foreign ownership, was challenged. The Licenses were conditionally granted to NextWave on January 3, 1997, after NextWave submitted to the FCC a plan to bring its capital structure into compliance with FCC regulations. On February 14, 1997, the FCC granted NextWave the Licenses conditioned upon NextWave issuing a series of promissory notes for the balance of its payments. On February 19, 1997, NextWave executed these promissory notes (the "Notes"), backdated to January 3. The Notes aggregated $4.27 billion, representing the remaining ninety percent of the bid price. By the time the Notes were executed, however, the market value of the Licenses, as later determined by the bankruptcy court, *see NextWave* IV.A, 235 B.R. at 303, had fallen to less than a quarter of the amount that NextWave had bid for them.

The C-block auctions were part of a series of auctions the FCC conducted to allocate spectrum for new technological uses. Prior to the C-block auctions, it had conducted the A- and B-block auctions, and in June 1996 it announced that it would conduct the D-, E- and F-block auctions starting on August 26, 1996. The winning bids at the A-, B-, D-, E- and F-block auctions were sharply lower than the winning bids at the C-block auc-

tions when measured in dollars per MHz-Pop, a generally accepted industry measurement standard.[4]

Since they were obligated to pay what turned out to be much higher prices for their licenses than other licensees, most of the winning C-block bidders, including NextWave, had difficulty securing the financing necessary for them to meet their financial commitments. They thus faced the prospect of an early default on their installment payments to the FCC.

The winning C-block bidders therefore petitioned the FCC for relief. In response, the FCC suspended the C-block installment payments and initiated an elaborate administrative process looking toward a restructuring of the C-block licensees' obligations.

On October 16, 1997, at the culmination of this process, the FCC issued a restructuring order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order*, FCC 97-342, 12 F.C.C.R. 16436 (Oct. 16, 1997),

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[4]The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. The A-, B-, and C-block licenses consisted of 30 MHz of spectrum; the D-, E-, and F-blocks of 10. One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people. NextWave's winning bids averaged at least $1.43/MHz-Pop, whereas the D-, E-, and F-block winning bids averaged $.33/MHz-Pop. The F-block auction, which like the C-block auction was reserved for qualified entities, produced winning bids that averaged only .246/MHZ-pops.

1997 WL 643811 (F.C.C.) (the "Restructuring Order"), which offered troubled C-block license holders three mutually exclusive restructuring options, ranging from amnesty -- return of the licenses in exchange for forgiveness of debt obligations -- to a plan that allowed bidders to keep as many of their licenses as they could pay for by converting seventy percent of their down payment into a prepayment of the full bid price of a smaller number of licenses. The FCC decided that it would be contrary to the public interest to forgive a portion of the obligations, thereby allowing bidders to keep their licenses at a significantly reduced price, because the C-block auction had been designed to ensure that licenses were allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *Id.* at ¶¶ 5, 19.

In response to the oppositions, petitions and replies that it received after the release of the Restructuring Order, the FCC issued a reconsideration order on March 24, 1998. *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, F.C.C. 98-46, 13 F.C.C.R. 8345 (Mar. 24, 1998), 1998 WL 130176 (F.C.C.) (the "Reconsideration Order"). The Reconsideration Order offered licensees slightly more flexibility in their decision-making process than the Restructuring Order, but otherwise left the Restructuring Order's framework intact. In response to still further petitions from C-block licensees, the FCC conducted yet more proceedings and issued a second reconsideration order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Order on Reconsideration of the Second Report and Order*, F.C.C. 99-66, 14 F.C.C.R. 6571 (Apr. 5, 1999), 1999 WL 183822 (F.C.C.) (the "Second Reconsideration Order"), which

essentially reaffirmed the determinations the FCC had made in its previous two orders.

NextWave actively participated in the administrative process that led to the promulgation of these orders, but it remained dissatisfied with the results. On May 29, 1998, NextWave filed a petition with the Court of Appeals for the District of Columbia Circuit asking for review of the orders. On June 8, 1998 -- the deadline for selecting from the menu of restructuring options provided by the orders -- it asked both the FCC and the Court of Appeals for a stay of those orders so that it would have more time to consider its options. The FCC and the Court of Appeals each denied NextWave's request. *See NextWave Telecom, Inc. v. FCC*, No. 98-1255 (D.C. Cir. June 5, 1998); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, FCC 98-104, 13 F.C.C.R. 11880 (June 1, 1998), 1998 WL 278735 (F.C.C.). The same day, NextWave filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses. *See NextWave* I, 235 B.R. at 267.

NextWave asserted two claims in the adversary proceeding. First, it argued that the transaction in which it acquired the Licenses was a fraudulent conveyance subject to avoidance under § 544 of the Bankruptcy Code (the "Code"). Second, it sought equitable subordination of the FCC's claim based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning the D-, E- and F-block licenses before approving NextWave's application for the C-block Licenses. The FCC moved to dismiss both claims.

The bankruptcy court dismissed the second claim for lack of subject matter jurisdiction, *see NextWave* I, 235 B.R. at 271; NextWave has not appealed from that order. Only the first claim is therefore before us. The

FCC argued below that the bankruptcy court also lacked subject matter jurisdiction over this claim because jurisdiction over actions brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The FCC also argued that the FCA preempted state fraudulent conveyance law. The bankruptcy court rejected these arguments, holding that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. *See NextWave* I, 235 B.R. at 269-71. The court therefore concluded that it had jurisdiction over the claim, and further found that the FCA did not conflict with or preempt its application of fraudulent conveyance law under § 544.

Section 544 (b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." Applicable law includes various state fraudulent conveyance statutes, many based on the Uniform Fraudulent Transfer Act.[5] *See Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). In analyzing a fraudulent conveyance claim under the act, courts determine whether the debtor was engaged or about to engage in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the size of the transaction. If so, and if the consideration provided by the debtor for the allegedly fraudulent transfer was not reasonably equivalent to what the debtor received in return on the effective date of the transfer, then

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[5]The bankruptcy court applied California, New York, and Washington, D.C. fraudulent conveyance law as the "applicable law," holding that there was no substantive difference between the laws of the three jurisdictions. *See NextWave* IV.A, 235 B.R. at 288-89.

the transfer is deemed constructively fraudulent and can be avoided.[6] *See NextWave* IV.A, 235 B.R. at 287-89. In NextWave's case, if there is a § 544 claim at all, its resolution turns on when NextWave's obligations to pay arose. If that is deemed to be the close of the C-block bidding, then the transfer could not be constructively fraudulent because NextWave paid exactly the market price for the Licenses as of that date, as determined by its own bid. *See NextWave* IV.A, 235 B.R. at 297 n.9. However, if the effective date is deemed to be January 3, the date on which the Licenses were conditionally granted, or February 19, 1997, the date on which they were finally granted in return for the executed Notes, then the obligation when it arose was for an amount far greater than what the bankruptcy court deemed to be the market price of the Licenses.

Hoping to resolve this issue quickly, the FCC moved for summary judgment on the question of when NextWave's $4.74 billion obligation was incurred. Despite the FCC's argument that under its regulations the entire obligation became due at the close of the C-block auction, the bankruptcy court found that the effective date of NextWave's obligations for the purposes of § 544(b) was January 3, 1997. *See NextWave* II, 235 B.R. at 276. The court acknowledged that 47 C.F.R. § 1.2104 subjected a winning bidder to a penalty upon default based on the difference between its bid and the high bid on reauction of the licenses, but held that "[n]othing in this calculation explicitly or implicitly

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[6]Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows the debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that same bargain.

binds the winning bidder to the full amount of its bid." *Id.* at 275.

The FCC then moved to dismiss the complaint on the ground that the avoidance claim challenged a contractual relationship with the United States entered into pursuant to a national regulatory scheme, and that federal common law, rather than state fraudulent conveyance law, therefore was the "applicable law" under § 544. In an oral decision, *NextWave* III, tr. at 50-51, the bankruptcy court refused to create new federal common law to govern the situation, reasoning that fraudulent conveyance law did not abrogate the explicit terms or purposes of the regulatory scheme under § 309(j). *See id.*, tr. at 53-54.

The parties then proceeded to trial. The bankruptcy court concluded under California law that NextWave's obligations were incurred on February 19, 1997; that on that date the Licenses were worth $1,023,211,000; and that all obligations above that amount were constructively fraudulent and therefore avoided. Since NextWave had already paid $474,364,806, or ten percent of its original high bid, to the FCC as a down payment, the remaining obligation was reduced to $548,846,194. *See NextWave* IV.A, 235 B.R. at 304; *NextWave* IV.B, 235 B.R. at 306. The avoidance remedy allowed NextWave to keep the Licenses while obligating it to pay less than one-quarter of the amount it had bid for them.

The FCC appealed to the district court, which affirmed for substantially the reasons stated by the bankruptcy court. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB) (S.D.N.Y. July 27, 1999). This appeal, which we have heard on an expedited basis, followed.

DISCUSSION

I. Standard of Review

Our review of the district court's decision affirming the bankruptcy court orders is plenary. We therefore undertake an independent examination of the legal and factual findings of the bankruptcy court, reviewing its findings of law de novo and its findings of fact for clear error. *See Kabro Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997).

II. The Authority of the Bankruptcy and District Courts

The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats.

Although not owned by the federal government, the radio spectrum is subject to strict governmental regulation.

> Before 1927, the allocation of [radio] frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76 (1969) (footnotes omitted). The scarcity of radio frequencies therefore required a regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to specific users. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); *see also*

National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) ("The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply."). Since 1934, that mechanism has been the licensing of blocks of spectrum for the "public interest, convenience, or necessity," under the FCA, 47 U.S.C. § 307(a), by the FCC. *See generally FCC v Pottsville Broadcasting Co.*, 309 U.S. 134, 136-38 (1940).

A license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms. *See* 47 U.S.C. § 301 (stating the purpose of the FCA, "to provide for the use of [radio] channels, but not the ownership thereof"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("[N]o person is to have anything in the nature of a property right as a result of the granting of a license."). Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good. *See* 47 U.S.C. § 308(b).

Historically, the FCC assigned licenses through a system of comparative hearings, rating and ranking applicants under a public interest standard. *See* 47 U.S.C. § 309(a). Partially in response to the huge administrative burden that this method of allocation placed on the FCC, Congress amended the FCA in 1981 by adding § 309(i), which allowed the FCC to award licenses by randomly selecting licensees from the qualified applicant pool. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736 (codified at 47 U.S.C. § 309(i)).

The use of lotteries lessened the administrative burden, but encouraged speculation and, ultimately, failed to allocate licenses to those most likely to use them most efficiently or beneficially. Especially in light of the proliferation of new spectrum-dependent communications technologies, a method was needed that would direct li-

censes toward those entities and technologies that would put them to the best use. *See* H.R. Rep. No. 103-111, at 248 (1993) (the "Committee Report"), *reprinted in* 1993 U.S.C.C.A.N. 378, 575.

In its search for such a methodology, Congress came to the conclusion that using market forces to allocate spectrum could accomplish congressionally defined policy goals. As the House Committee on Energy and Commerce explained, "[A] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." *Id.* at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580. Congress therefore enacted 47 U.S.C. § 309(j) authorizing the FCC to develop a system for allocating spectrum through a competitive bidding process. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j)(3) requires the FCC to design a system of competitive bidding that protects the public interest and promotes the following substantive objectives:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]
>
> (D) efficient and intensive use of the electromagnetic spectrum . . . .

47 U.S.C. § 309(j)(3).

While the FCC was expected to "recover[] for the public a portion of the value of the public spectrum" and to avoid "unjust enrichment," the broader purpose of § 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue.[7] Instead, it was told to auction licenses to the

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[7]Section 309(j) (7) (A) specifically limits the degree to which the FCC can designate the generation of revenue as a factor in the "public interest," demonstrating Congress's intent that satisfaction of the FCA's objectives not be equated with income maximization. "[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues." 47 U.S.C. § 309(j) (7) (A). "While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding," the process "does not amount to maximizing revenue, nor is it [the FCC's] sole objective." *In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 73 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.).

highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580.

In implementing § 309(j), the FCC echoed the congressional rationale: "[A]uction designs that award licenses to the parties that value them most highly will best achieve" the goals set forth by Congress. *In the Matter of Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 70 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.) ("Second Order"). The FCC's views reflect a classical belief in the efficacy of market forces:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

Id. ¶ 71.

Starting from this premise -- that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free," Committee Report at 249, *reprinted in* 1993 U.S.C.C.A.N. at 576 -- the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and retaining a spectrum license acquired through a § 309(j) auction. *See* 47 C.F.R. § 24.708.

This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions. The FCC gave considerable thought to the problem of how to "deter frivolous or in-

sincere bidding." Second Order ¶ 171. It decided that it would be "critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction." *Id.* ¶ 197.

Generally, bidders were required to obtain purely private financing and to pay up front for their licenses.[8] *See* 47 C.F.R. § 1.2109(a); Second Order ¶ 194. But "designated entities," such as NextWave -- "designated" because they were less financially powerful than non-"designated" bidders and therefore presumably unable to pay up front -- were allowed to pay in installments. *See* 47 C.F.R. § 24.711(b); Second Order ¶ 194. It was important for the functioning of the auction of licenses to "designated entities" that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the "detailed credit checks" and other forms of due diligence that otherwise would be necessary to ensure, within the framework of a competitive auction method of spectrum allocation, that the licenses would be awarded to the appropriate entities. *See* Second Order ¶¶ 194, 197-98.[9]

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[8]"Designated entities" include "small businesses, rural telephone companies and women- and minority-owned firms." Second Order ¶ 6.

[9]The district court below held that the avoidance remedy requested by NextWave had "nothing to do with" the organization, execution, or implementation of the auctions. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 99 Civ. 4439 (CLB), slip op. at 5 (S.D.N.Y. July 27, 1999). *See* infra at 36.

For entities like NextWave that chose to pay the balance of their winning bids in installments, payment of the installments in full was explicitly made a condition of license retention. *See* 47 C.F.R. § 1.2110(f)(4)(iii). When this condition was challenged as a result of the precipitous decline in auction values following the C-block auction, the FCC conducted extensive administrative proceedings on the question and produced three orders declaring that C-block bidders could not keep their licenses without paying the full bid price for them. *See Restructuring Order* ¶¶ 2, 5; *Reconsideration Order* ¶¶ 2, 10; *Second Reconsideration Order* ¶ 1. It sought in this manner to adhere to the fundamental rationale of the competitive scheme: Those qualified bidders who could pay the most were those who should be awarded the licenses. *See Restructuring Order* ¶ 19; *see also Second Order* ¶ 5. These rules and orders, which express the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest, thus manifest substantive regulatory decisions about the allocation of spectrum.

Despite the new statutory scheme for allocating spectrum, the FCA draws no categorical distinctions among the three methods of license allocation -- comparative hearing, lottery and auction. Each is presumed to be a regulatory tool for ensuring that licenses are distributed in the way that fulfils the goals of the FCA. *See* 47 U.S.C. § 309(a). And each license, on whatever basis it is awarded, is not to "be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301.

A. The FCC and the Courts

The Supreme Court has emphasized that the FCA's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (internal quotation marks and citation omitted). "Congress assigned to the Federal Com-

munications Commission . . . exclusive authority to grant licenses" under the Act. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553 (1990), *overruled on other grounds, Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995). The FCC was "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *Southwestern Cable Co.*, 392 U.S. at 168 (internal quotation marks and footnotes omitted). In this case, we are required to "enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of" radio transmissions. *Pottsville Broadcasting Co.*, 309 U.S. at 136-37.

For over fifty years the Supreme Court has recognized that under the FCA the division of authority between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946).

The FCC's exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use:

> An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.

P & R Temmer v. FCC, 743 F.2d 918, 927 (D.C. Cir. 1984).

If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject.

When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity. Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.

B. The Rulings of the Bankruptcy and District Courts

It is against this background that the inability and consequent failure of NextWave to pay for its C-block Licenses must be considered. The FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the Licenses to NextWave. NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, in regulatory terms, that NextWave was not entitled to the Licenses.

NextWave urged the bankruptcy and district courts to treat these proceedings as "a simple bankruptcy case." The courts apparently agreed. The bankruptcy court

found that "the issues before [it] . . . concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave] ." *NextWave* V, 235 B.R. at 314. According to the district court, "[t]he claim ha[d] nothing to do with the FCC's 'organization, execution, or implementation' of the radio spectrum auction. Neither d[id] the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses." *NextWave*, No. 99 Civ. 4439 (CLB), slip. op. at 5.

This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives. The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor, any more than it turns an FCC license won at auction into a property estate in spectrum. Nothing about putting spectrum licenses up for auction rendered them anything other than licenses, and the sole responsibility for the allocation of licenses lies with the FCC, with appeal to the courts of appeals, not the bankruptcy or district courts.

By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them.[10] In so doing they exer-

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[10]The rules of construction included within § 309(j) reinforce this understanding. They say, "Nothing . . . in the use of competitive bidding shall . . . (C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). In other words, even when they are *allocated*

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cised the FCC's radio-licensing function. *Cf. National Broadcasting Co.*, 319 U.S. at 224. "[T]he weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance," *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (internal quotation marks and citation omitted), with deferential judicial review reserved to the courts of appeals. But even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, *see NextWave* III, No. 99 Civ. 4439 (CLB), slip. op. at 14; *NextWave* IV.B, 235 B.R. at 311-12, they were utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis. *See Scripps-Howard Radio, Inc.*, 316 U.S. at 14.

This is not to say that these courts lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors. NextWave's arguments that the FCC seeks to frustrate the purposes of the bankruptcy laws are therefore misplaced. We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC.[11]

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through the use of competitive bidding, spectrum licenses remain just that, *licenses* subject to regulation and reclamation by the FCC.

[11]The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other

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As Justice Frankfurter noted nearly sixty years ago, "[t]he Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Pottsville Broadcasting Co.*, 309 U.S. at 138. In response to changing technological imperatives and policy preferences, Congress and the FCC have chosen to manage the "dynamic aspects" of spectrum allocation in a new way, by employing market forces in an attempt to ensure efficient and publicly beneficial resource allocation. Despite subsequent revolutions in technology, however, the observation of Justice Frankfurter still holds: In order for Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions must not be interfered with by other instrumentalities of the federal government acting beyond their statutory authority.

III. Constructive Fraud

While we reverse the district court's affirmance of the bankruptcy court orders issued in the adversary proceeding, and hold that these courts lacked jurisdiction to employ remedies that abrogate the FCC's licensing authority, we recognize that NextWave will remain a debtor in bankruptcy. If the Licenses are returned to the FCC, the bankruptcy court may resolve resulting finan-

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creditors." *NextWave* I, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocator of licenses. Such was the case here. As for NextWave's other creditors, jurisdiction in the bankruptcy and district courts is not created by any interest these creditors might have in NextWave retaining but avoiding payment on the Licenses.

cial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt. In light of these possible further proceedings, there remains for us the question of the nature of NextWave's obligation, which the bankruptcy court decided, *see NextWave* IV.A, 235 B.R. at 287-91, and which may on remand have substantial effect on the determination of the FCC's rights as creditor.[12] We hold, contrary to the rulings by the bankruptcy and district courts, that NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent.

Under the avoidance provisions of the Code, a transfer or obligation is or is deemed to be a fraudulent conveyance -- and therefore avoidable -- if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. §§ 544, 548(a)(2)(A) (1993 & Supp. 1999).[13] It is uncontested that the question of reasonably equivalent value is determined by the "value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of debt* which is challenged." *NextWave* IV.A, 235 B.R. at 290 (citing *In re Best*

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[12]Because the consequences of constructive fraud are not limited to 11 U.S.C. § 544, we believe appellate consideration of this holding is necessary.

[13]Both NextWave and the FCC concede that any choice-of-law questions as to the fraudulent conveyance issue are obviated by the coincidence of § 548, on the one hand, and the applicable New York, California, and Washington, DC laws, on the other. *See NextWave* IV.A, 235 B.R. at 289.

Products Co., 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994)) (emphasis added).

The date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable. If NextWave incurred the obligation at the close of the auctions, then the value of the Licenses would by definition be $4.74 billion, since "the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction." *NextWave* IV.A, 235 B.R. at 297 n.9 (noting NextWave's concession of this point). And if the fair market value was $4.74 billion, then there was no constructive fraud. On the other hand, if the obligation first arose on or about the date on which the Licenses were conditionally granted (following the fall-off in auction prices at the D-, E- and F-block auctions), then the $4.74 billion bid exceeded the fair market value as measured by the subsequent auction prices.

The bankruptcy court held that NextWave's payment obligation did not arise until the conditional grant of the Licenses on January 3, 1997. The court placed great weight on the idea that an obligation evidenced by a writing arises when the writing is delivered:

> Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g.*, *In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84

> (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California [Uniform Fraudulent Transfer Act] provides that "[a]n obligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code §3439.06(e) (2) [(1997)].

NextWave IV.A, 235 B.R. at 289 (ellipsis and second set of brackets in original).

The obligation to pay the *Notes* attached upon their delivery, as the writing rule confirms, but that observation begs the crucial question: When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

We conclude that NextWave bid $4.74 billion for the right -- excluding other bidders -- to be the qualified licensee of the Licenses, and became obligated to assure payment of $4.74 billion for the Licenses either by cash and credit on delivery or by submitting to liability for the shortfall if NextWave -- which knew the rules for qualification -- failed to qualify.

Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference, but to which the courts below refused deference on grounds we conclude are invalid. The FCC's interpretation is supported, in turn, by the auction law principle that an obligation attaches when the seller no longer can reject the bidder's offer as a matter of discretion.[14]

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[14]Because we believe there are adequate other grounds for reversing the courts below in this case, and because we think the FCC has provided us with a rational interpretation

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A. FCC Regulations

The FCC's rules establish the close of the auction as the time of obligation. The FCC's formal interpretation of its own regulations, albeit issued after the auction, provides that the binding obligation to pay the full bid price attaches to the winning bidder "upon acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Services Licenses*, FCC 98-301 (Dec. 23, 1998), 1998 WL 889489 (F.C.C.) ¶ 1. Other FCC publications clarify that the "acceptance of the high bid" occurs at the close of the

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of its regulations that warrants our deference, we do not reach the question of whether federal common law governs auctions conducted pursuant to the FCA in the absence of satisfactory statutory or regulatory guidance. If we were to apply federal common law, it would not be "federal common law in the strictest sense, *i.e.*, a rule of decision that amounts, not simply to an interpretation of a federal statute, but, rather, to the judicial 'creation' of a special federal rule of decision," *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998) (internal citations and ellipses omitted) (citing *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)), and federal courts often employ federal common law "principles" in interpreting federal statutes. *See, e.g., Burlington* at 2269-70 (agency); *United States v. Bestfoods*, 118 S. Ct. 1876, 1886 n.9 (1998) (discussing veil piercing under CERCLA). In the present case, however, we content ourselves with reviewing and rejecting the conclusions that NextWave claims to draw from the principles of auction law. We refrain from engaging in the kind of "willful policymaking, pure and simple," *Burlington* at 2273 (Thomas, J., dissenting), that might result from drawing intuitively on purported common law "principles." *See Id.* at 2273 (decrying use of "agency principles" drawn entirely from Restatement (Second) of Agency).

auction: "Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed." *Public Notice, Auction of C, D, E, and F Block Broadband PCS Licenses*, DA-98-2604 (Dec. 23, 1998), 1998 WL 892962 (F.C.C.) at 4. The FCC's interpretation enjoys a presumption of correctness: "We must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *accord New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997). It is not this Court's task to choose which among several competing interpretations best serves the stated regulatory purpose; "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted); *accord New York v. Shalala*, 119 F.3d at 182. This Court defers to the agency's interpretation unless a different reading is compelled by the plain meaning of the regulation or some other indicia of the agency's intent at the time of promulgation. *See Thomas Jefferson Univ.*, 512 U.S. at 512. Deference is especially appropriate where "the regulation concerns 'a complex and highly technical regulatory program.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

In this case, the FCC interprets its regulation to mean that NextWave's obligation attached upon the close of the auction, and nothing justifies a departure from that interpretation. At the close of the auction NextWave became obligated, if qualified, to pay the $4.74 billion bid price or, if unqualified, to pay a prescribed penalty. The FCC's penalty rules provide that default between the close of the auction and the grant of the Licenses exposes the winning bidder to liability for the amount it bid less the winning bid upon re-auction of the Licenses. *See* 47 C.F.R. § 1.2104(g)(1)-(2). This "penalty" is the functional analog of expectation damages; that is, the FCC must mitigate its harm by a re-auction, but the original winning bidder is liable for any shortfall be-

tween the subsequent winning bid and its own. So although labeled a "penalty," this remedy is fully consistent with the notion that the winning bidder becomes liable for full price of the winning bid upon the close of the auction.

The bankruptcy court, however, held that it owed no deference to the FCC's regulations or the Commission's interpretation thereof because (a) the FCC appears in bankruptcy court as a creditor rather than as a regulator, and so is due no more deference than other creditor; and (b) the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled) in this case by reason of the self-serving nature of the FCC's post hoc interpretation.

(a) *The FCC's Creditor Status.* The bankruptcy court treated the FCC as a creditor like any other, and thus refused to allow the FCC to construe its contractual rights (after the fact) in a way that would be binding in the bankruptcy proceeding:

> [T]he FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. Stated simply, the FCC's regulations, to the extent that they establish and govern the rights and obligations of the FCC and the licensee in their capacities as creditor and debtor, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis-à-vis its debtor.

NextWave V, 235 B.R. at 317 (emphasis added). This reasoning insufficiently accommodates the dual role that the FCC plays in this proceeding. *See supra* Part II. In granting licenses by auction, the FCC acts as creditor and regulator both. We need not decide what happens at

each point of overlap, but the regulatory function is not ended by the bankruptcy of a licensee or license claimant, and as the function persists it must perforce be carried out.

True, the FCC's regulatory interpretation in this case favors the interests of the federal fisc over those of other NextWave creditors: It prevents the bankruptcy court from extinguishing approximately $3.7 billion of debt owed for the Licenses. It does not follow, however, that the FCC's regulatory interpretation is proffered by the FCC as creditor only and not as regulator in whole or part. The FCC's interpretation, which was rejected below as self-serving because it advances the FCC's interest as creditor, also advances important regulatory purposes *See supra* Part II; *Second Order* ¶ 5; *Restructuring Order* ¶ 19.

The bankruptcy court's denial of deference to the FCC was premised on the understanding that the FCC was acting solely as a creditor in this action. Because the FCC was acting in part as a regulator as well as a creditor, we have no occasion to decide here whether the bankruptcy courts owe deference to the regulatory interpretations of agencies acting strictly as creditors. It is possible that in future proceedings the FCC may stand in a strict debtor/creditor relationship to NextWave. But since we do not know what steps the FCC will take vis-à-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe.[15] *Cf. Mountain Solutions, Ltd. v.*

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[15]This appeal stems from an adversary proceeding initiated preemptively by NextWave. Because of the ongoing litigation, the FCC has not yet sought to take any action vis-à-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course

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FCC, 197 F.3d 512 (D.C. Cir. 1999) (holding that a request for injunctive relief, made by a bidder at a spectrum auction, was not ripe when the actual order imposing default penalties had not yet issued). We limit ourselves here to finding that NextWave's obligations were incurred at the close of auction and that the transaction in which they were incurred was therefore not constructively fraudulent. Where the regulatory agency acts as both regulator and creditor, we owe deference to its interpretation of its regulations.

(b) *The FCC's Self-Interest.* The courts below emphasized and relied on the self-serving nature of the FCC's interpretation and a perceived lack of connection between its interpretation and the original legislative purpose of the auction regime. We have already noted that the FCC's interpretation, though financially advantageous to the federal government, also furthers regulatory goals. The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.

The level of judicial deference depends in part on whether an agency interpretation is consistent or in conflict with the goals of the regulation as stated when it was adopted. *See Thomas Jefferson Univ.*, 512 U.S. at 512. As counsel for NextWave agreed at oral argument before us, one congressional goal in authorizing the FCC to conduct auctions was to achieve fair and efficient al-

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that the agency will ultimately follow. We do not know, for example, the size of the penalty the FCC may seek to recover, or even whether it will seek to recover its regulatory penalty, recover on the Notes, or recover on both. It is possible that if the FCC chooses to pursue some of these options -- say, collection on the Notes it may find itself acting as a creditor.

location of spectrum licenses. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580; *Second Order* ¶ 73. The auction mechanism can do so only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue. And this goal is served only if the high bid entails the obligation to make good the amount bid, either by a qualified bidder's payment on delivery or by payment of any shortfall (upon re-auction) by a bidder who fails to qualify. If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired. The FCC's insistence on full payment is consistent with the goals of the auction.

B. Auction Law

The parties and the bankruptcy court make several arguments based on the principles of auction law. We do not think it is necessary to rely on or to appear to create a federal common law of auctions in order to resolve this appeal. We think that the principles of auction law are useful nonetheless, at least insofar as they confirm and reinforce the rationality of the FCC's interpretation of its regulations.

The bankruptcy court held that NextWave gained nothing at the close of the auction except the right to apply for the Licenses, relying upon the following colloquy with counsel for the FCC:

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question or value for what? And equivalent to what?
>
> [FCC]: To what they got.
>
> THE COURT: What did they get?
>
> [FCC]: What they got was the right to apply for these licenses that were essential to their busi-

> ness. And without those licenses, they would have no business.

NextWave II, 235 B.R. at 274. In summary of the court's reasoning below (which summary may not do the analysis full justice) : Delivery of the Licenses, notwithstanding the auction and NextWave's high bid, remained contingent upon the FCC's determination sometime later that NextWave's application should be granted; the auction was therefore of the kind conducted with a reserve; like such reserve auctions, the high bidder's obligation to pay did not arise when the hammer fell; the reserve in this case was not lifted until at least such time as the FCC decided to deliver the Licenses; and NextWave's obligation to pay the amount of the high bid therefore did not arise until the date on which the Licenses were delivered and the Notes delivered in exchange. We disagree. The close of the auction established the FCC's obligation to grant NextWave the Licenses if the company fulfilled statutory eligibility requirements, and NextWave became liable at that time for full payment on the Licenses at the stated price.

As in contract law more generally, a sale by auction is valid only upon offer and acceptance. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall) 196, 206 (1865); 7 *Am. Jur. 2d Auctions and Auctioneering* § 20 (1997). As a baseline rule, the close of the auction -- traditionally the drop of the hammer -- signals acceptance of an offer and forms an enforceable contract. *See* 7 *Am. Jur. 2d Auctions and Auctioneering* § 34; 7A *C.J.S. Auctions and Auctioneers* §§ 8, 12 (1980). A bidder has a right to withdraw the bid at any time before its acceptance. *See Blossom*, 70 U.S. at 206; 7 *Am. Jur. 2d Auctions and Auctioneering* § 33; 7A *C.J.S. Auctions and Auctioneers* § 13. The timing of acceptance, and therefore of the creation of a contractual obligation, is different if the auction sale is conducted "with reserve": "Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller

and the bidder until the seller accepts the bid." 7 *Am. Jur. 2d Auctions and Auctioneering* § 20; *see also Blossom*, 70 U.S. at 206; 7A *C.J.S. Auctions and Auctioneers* § 11.

If by virtue of the required statutory approval, the FCC's spectrum-allocation process became an "auction with reserve," then (under the principles of auction law) NextWave's obligation to pay would not have arisen until the FCC approved the grant of the Licenses to NextWave, *after* the drop in market value reflected in (or precipitated by) the auction of the D-, E- and F-blocks. The finding of constructive fraud rests on that analysis. On the other hand, if the obligation to pay or make good the winning bid arose when the winning bid was announced, *before* the drop in market value, then the obligation NextWave seeks to avoid cannot be characterized as a constructive fraud.

We conclude that the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, even though the resulting contract had more terms than would be common at the auction of a saleable thing by a private seller. By conducting the auction, the FCC offered to deliver the Licenses to the qualified high bidder. By bidding, NextWave represented that it was qualified to receive the Licenses. By making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the amount of any shortfall in a re-auction of the same Licenses.

The requisite statutory approval by the FCC was not a "reserve" that (until lifted) prevented any enforceable obligation on the part of the high bidder. Auctions with reserve stand or fall as a matter of the seller's discretion, usually on the basis of the pecuniary sufficiency of the bids. *See* 7 *Am. Jur. 2d Auctions and Auctioneering*

§ 23 (defining the phrase "without reserve" in terms of the seller's right to "withdraw[] the property from sale if he is not pleased with the bids"); *see also Drew v. John Deere Co.*, 241 N.Y.S.2d 267, 269-70 (App. Div. 1963); 7 *Am. Jur. 2d Auctions and Auctioneering* § 21 ("[I]n an auction with a reserve, the auctioneer *may* withdraw the items for auction at any time until he announces completion of the sale." (emphasis added))

The nature of the statutory approval requirement in this case is neither discretionary nor economic. The FCC's act of naming NextWave the winning bidder obligated the FCC to deliver the Licenses to NextWave, at the price determined by NextWave's winning bid, if NextWave fit certain noneconomic qualifying criteria. *See In the Matter of the Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Fifth Report and Order*, FCC 94-178; 9 F.C.C.R. 5532 (July 15, 1994), 1994 WL 372170 (F.C.C.) ¶ 81 ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner."); 47 C.F.R. § 1.2108(d) (1) ("If the Commission determines that . . . an applicant is qualified . . . it will grant the application."). NextWave cites *Mobile Communications Commission v. FCC*, 77 F.3d 1399 (D.C. Cir. 1995), as demonstrating that the FCC has no obligation to grant the license at the bid-upon price. *MCC v. FCC*, however, dealt not with the FCC's decision that a bid price was insufficient but with the FCC's determination that the licensee was ineligible for a "pioneer's preference" and thus had to pay for its license. *See id.* at 1408-09. The case is inapposite.

NextWave knew about the statutory criteria for approval before the bidding began. *See* 47 C.F.R. § 310(b)(4) (1991); 47 C.F.R. §§ 24.709, 24.712, 24.720 (1996). In the event, the only obstacle to closing encountered by NextWave was its own noncompliance with the foreign ownership requirements. NextWave's

willingness to bid notwithstanding the undisputed fact that noncompliance would prevent delivery of the Licenses and compel NextWave to insure the government against a lower high bid at re-auction demonstrates that NextWave assumed the risk of its own non-compliance.

True, there appears to be an element of discretion in the FCC's decision to grant the Licenses conditionally, pending NextWave's compliance with statutory requirements. However, that conditional grant was temporary, *see In re Applications of NextWave Personal Communications, Inc. for various C-Block broadband PCS Licenses*, DA 97-328 (Feb. 14, 1997), at 2, and the FCC had no power to waive the statutory requirements permanently. Moreover, it was a temporary discretionary *approval*; the FCC had no authority to *reject* NextWave's bid as a matter of discretion.

Thus the FCC was obligated to deliver the Licenses at the agreed-upon price if NextWave could demonstrate that it met certain statutory and regulatory eligibility requirements, and NextWave assumed the risk of its failure to do so. The FCC was bound, and so was NextWave. After acceptance of the offer, "as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 7 *Am. Jur. 2d Auctions and Auctioneering* § 20 (1997); *see also Blossom*, 70 U.S. at 206.

The FCC's dual role in the licensing process -- as offeror in the auction and as regulator thereafter -- confers on the FCC prerogatives that are not enjoyed by the ordinary seller. The FCC thus retains the authority to reject a high bid for *regulatory* purposes. But NextWave knew, at the time of the auction, that the winning bidder would look to the FCC both as creditor and as regulator. If NextWave objected to the conditions imposed by the FCC or to the FCC's dual role in the transaction, NextWave could have refrained from participating in the auction.

The point is well illustrated in *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953). In a surplus auction conducted near the end of World War II, the federal government reserved a unilateral right to withdraw from sale certain chemicals and drugs, even after accepting the winning bid. *See id.* at 630. When the government sued the winning bidder for default, the bidder defended on the ground that the contract was defective for failure of mutuality. *See id.* at 631. The Seventh Circuit affirmed the finding of liability for breach, *see id.* at 633, on the ground that a condition made known to the buyer --even the unilateral right of the seller to withdraw from the contract -- did not abrogate the buyer's obligation to perform. *See id.* at 632-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633, on the ground that a condition made known to the buyer -- even the unilateral right of the seller to withdraw from the contract – did not abrogate the buyer's obligation to perform. *See id.* at 623-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633.[16]

CONCLUSION

We hold that the bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses and that, in any event, the courts erred in determining that NextWave's payment obligation was constructively fraudulent. We therefore reverse the judgment of the district court affirming the five orders of the bankruptcy court and remand for further pro-

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[16]Cases cited by NextWave to support the contrary argument, which concern auctions with reserve, are not on point. *See, e.g., Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520-21 (1925); *Ferry v. Udall*, 336 F.2d 706, 709 (9th Cir. 1964).

ceedings consistent with this opinion, if any are necessary. The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

40 Foley Square

New York, NY 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23 day of August Two Thousand

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In Re: FCC 99-5063

[Filed Aug. 23, 2000]

A petition for rehearing and a petition for rehearing in banc having been filed herein by the Appellee NextWave,

> Upon consideration by the panel that decided the appeal, it is Ordered that the petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Roseann B. McKechnie, Clerk

By: _____/s/_____
Beth J. Meador,
Administrative Attorney

TITLE 11. BANKRUPTCY
CHAPTER 1. GENERAL PROVISIONS

11 USCS § 106 (2000)

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money

judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

* * *

TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

11 U.S.C. § 525

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to re-

new a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I. ORGANIZATION OF COURTS
CHAPTER 6. BANKRUPTCY JUDGES

28 U.S.C. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title

(2) Core proceedings include, but are not limited to—

* * *

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

* * *

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 U.S.C. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been com-

menced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART VI. PARTICULAR PROCEEDINGS

CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

28 U.S.C. § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d));

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

* * *

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION PROCEDURAL AND ADMINISTRATIVE PROVISIONS

47 U.S.C. § 402

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

MOTION FILED

OCT 23 2000

(2)

No. 00-447

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Urban Comm-North Carolina, Inc. ("UC-NC") respectfully moves pursuant to Rule 37.2 of the Court for leave to file the accompanying brief as *amicus curiae* in support of the petition of NextWave Personal Communications Inc. ("NextWave") ("the Petition"), Docket No. 00-447, for a writ of certiorari to the to the United States Court of Appeals for the Second Circuit. The Solicitor General, attorney for Respondent herein, the Federal Communications Commission ("the FCC"), has consented to the filing of an *amicus curiae* brief, and his letter of consent has been lodged with the Court on behalf of UC-NC in this case. UC-NC has requested but not received NextWave's consent to the filing of an *amicus* brief.

As explained more fully in the attached brief under "Interest of *Amicus Curiae*," UC-NC has a critical interest in this appeal in that it stands in the same position vis-a-vis the FCC as NextWave. Like NextWave, UC-NC was a successful bidder at auction and was granted broadband Personal Communications Services ("PCS") spectrum licenses by the FCC but was, as were many other licensees, subsequently forced to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code") due to the FCC's actions. The FCC has announced its intention to re-auction the licenses it granted to UC-NC in the same auction in which it intends to re-auction the licenses it granted to NextWave. Whether UC-NC and the numerous other licensees who stand in the same position as NextWave and UC-NC will be able to reorganize successfully, complete the build-out of their PCS systems and commence serving the public may well turn on the decision of this Court in the instant action.

NextWave persuasively argues in its Petition that the Court of Appeals for the Second Circuit unduly limited the wide grant of jurisdiction provided to District Courts and, by reference, Bankruptcy Courts, in 28 U.S.C. § 1334(b). In the accompanying *amicus* brief, UC-NC argues, in addition, that (1) a regulatory agency which undertakes to engage in commercial transactions with non-governmental entities should be subject to the same rules as any other entity engaged in commercial transactions, including the rules contained in the Bankruptcy Code; (2) assuming *arguendo* that the Bankruptcy Court does not have jurisdiction to review regulatory action, it does have jurisdiction to determine whether it has jurisdiction by scrutinizing the nature of the agency action and in the instant case concluded correctly that the FCC's rescheduling of NextWave's licenses for re-auction had no regulatory foundation; and (3) the Bankruptcy remedies here invoked were designed to, and do, provide the perfect solution for situations such as the one in which NextWave and UC-NC have been placed.

Wherefore, UC-NC respectfully asks that the Court permit UC-NC to submit the accompanying *amicus curiae* brief in support of the Petition.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), a small, start-up business formed by a group of minority individuals, has an interest in the Petition because it, just as the Petitioner, NextWave Personal Communications Inc. ("NextWave"), is a holder of broadband Personal Communications Services ("PCS") C Block spectrum licenses obtained at auction[2] and it, just as NextWave, and for the same reasons (*see* Petition, p. 10), was foreclosed from raising the capital necessary to meet its construction costs and payment obligations to the FCC and, therefore, found it necessary to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code").[3]

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1. The Solicitor General has given his consent to the filing of this brief and, in compliance with Supreme Court Rule 37.2, his letter of consent has been lodged with the Court. *Amicus* has sought but not obtained the consent of Petitioner to the filing of the brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. In May of 1996, after 184 rounds of bids, Urban Communicators PCS Limited Partnership ("UCPCS"), the parent of UC-NC's parent, Urban Comm-Mid-Atlantic, Inc., was the high bidder at a Federal Communications Commission ("FCC") auction for the right to apply for C Block licenses within ten basic trading areas ("BTAs") in North Carolina. UCPCS's bids, which totaled $74.6 million, were consistent in amount with bids for licenses in similar BTAs throughout the country. UCPCS assigned its C Block license applications to UC-NC. The FCC conditionally granted the licenses to UC-NC, which made the required downpayment and later executed notes payable to the FCC in the amount of the then outstanding balance.

3. 11 U.S.C. § 101, *et seq.*, as amended.

Thereafter, UC-NC commenced an avoidance action by adversary complaint against the FCC to value the licenses as at the time UC-NC incurred the obligations to the FCC and avoid the difference as a fraudulent conveyance.[4]

As it did in NextWave's action, the FCC moved in the District Court to withdraw the reference of the Chapter 11 case to the Bankruptcy Court and to dismiss the avoidance action. The District Court denied the motion to withdraw and left it to the Bankruptcy Court to decide the motion to dismiss.[5] Upon remand of its Chapter 11 case to the Bankruptcy Court, the Bankruptcy Judge advised the parties that he would defer decision on the FCC's motion to dismiss UC-NC's adversary proceeding pending the determination by the U.S. Court of Appeals for the Second Circuit of the FCC's appeal in the *NextWave* action. After the Second Circuit's decision,[6] Honorable Richard L. Bohanon, U.S. Bankruptcy Judge, continued the deferral pending this Court's determination of NextWave's petition for a writ of certiorari.[7] When that petition was denied,[8] the FCC asked

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4. *Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.).

5. *Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, No. 99 Civ. 2618 (RMB) (S.D.N.Y. July 20, 1999).

6. *FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999).

7. *NextWave Personal Communications Inc. v. FCC*, 68 U.S.L.W. (U.S. June 9, 2000) (No. 99-1980).

8. *NextWave Personal Communications Inc. v. FCC*, 69 U.S.L.W. 3257 (U.S. October 10, 2000) (No. 99-1980).

Honorable Robert E. Gerber, U.S. Bankruptcy Judge, to dismiss the adversary proceeding on the authority of that decision. UC-NC, in turn, requested that any action on the FCC's motion to dismiss be deferred pending this Court's decision of NextWave's present petition for certiorari and, if the Petition is granted, this Court's decision on the merits. UC-NC's adversary proceeding and the FCC's motion to dismiss it are still pending.

Upon obtaining a copy of a public notice released on September 6, 2000, by the Wireless Telecommunications Bureau of the FCC ("the Public Notice"),[9] UC-NC learned that the FCC had decided to re-auction UC-NC's licenses.

Whether UC-NC can successfully reorganize, complete the build-out of its PCS system and supply to a technology-deprived population in North Carolina the wireless communication services Congress wanted to foster, or will face liquidation, may well turn on the decision by this Court in the instant action. The importance of the issues presented in the Petition and in this brief is attested to by the fact that a number of C Block licensees, representing a significant percentage of the successful bid prices and licenses auctioned, have filed for bankruptcy protection or have defaulted on their payments to the FCC. Due to no fault of their own, and largely due to the irresponsible and self-defeating manner in which the FCC conducted the license auctions, as discussed below, they were unable to raise the capital required to construct their systems and meet their payment obligations to the FCC. At stake here is the future of the licensees, as well as the timeliness with which the most technology-deprived parts of the public will have access to PCS services.

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9. *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000; Revised List of Available Licensees; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues*, Public Notice, No. DA 00-2038 (September 6, 2000).

SUMMARY OF ARGUMENT

The issue framed in the lower courts is whether the fact that the FCC conducted the C Block auctions pursuant to its mandate to allocate those licenses so as to assure the most efficient use of spectrum immunizes the FCC from the application of the provisions of the Bankruptcy Code. The FCC contends that the auction bid prices must be timely paid, at pain of forfeiture of the licenses as well as the hundreds of millions of dollars paid by the successful C Block bidders, in order to accomplish the FCC's regulatory purpose of ensuring the most efficient and prompt spectrum use; that its determination in that regard is regulatory; and that the Bankruptcy Court lacks jurisdiction to countermand that decision. The Second Circuit accepted the FCC's contentions. UC-NC submits that NextWave's Petition should be granted and, on appeal, the Second Circuit's decision reversed because, as persuasively shown in the Petition, the Bankruptcy Court has jurisdiction to review all actions of the FCC in the course of the administration of an estate and because:

> (1) regardless of any asserted regulatory purpose for the FCC's insistence on full payment for the licenses it sold to NextWave, its actions in that respect must be held to be subject to the protective remedies of the Bankruptcy Code[10] inasmuch as the FCC chose to regulate by entering into

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10. As applicable here, the automatic stay of the Bankruptcy Code for the protection of the property of the estate, (11 U.S.C. § 362(a)(1),(3)-(6)), the debtor's right to cure any default in post-petition payment of debts, (11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A)), and the prohibition against payment to creditors during the pendency of the bankruptcy proceedings without approval of the bankruptcy court (11 U.S.C. § 363). *See In re NextWave Personal Communications Inc.*, 244 B.R. 253, 266-76 (Bankr. S.D.N.Y. 2000), *mandamus granted, In re FCC*, 217 F.3d 125 (2d Cir. 2000).

commercial transactions and thereby necessarily assumed the same responsibilities as any other participant in a commercial transaction ("I" below);

(2) in any event, the FCC's insistence on full and timely payment from bidders who were deprived of the ability to pay by the FCC's own actions manifestly does not serve to further the Congressional intent to assure efficient and prompt use of spectrum and thus is not in fact regulatory action ("II" below); and

(3) the remedies of the Bankruptcy Code provide the ideal solution to the conundrum with which the parties — the bidders *and* the FCC — are faced ("III" below).

ARGUMENT

I. The FCC'S Cross-Over

In consonance with prevailing trends towards deregulation and reliance on market forces instead of presumed bureaucratic wisdom, and with a view towards containment of administrative costs and realization of revenue from the national resources,[11] Congress authorized

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11. President Clinton proposed in his budget submitted to Congress [for fiscal year 1994] that the FCC be given authority to use competitive bidding as a source of revenues and as a means of improving the spectrum assignment process. . . . In many ways, President Clinton[']s budget takes a position similar to the Bush and Regan administrations. It has long been the view of NTIA and the FCC that the

(Cont'd)

the FCC to allocate radio spectrum licenses by competitive bidding rather than, as in the past, by administrative adjudication or random allocation at no charge to the licensee for the license.[12] In carrying out this mandate — selling licenses at their full commercial value and structuring the sale as a typical commercial transaction — the FCC placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. It should make no difference whether the FCC's action in selling licenses to the highest bidder is considered to be regulatory action, as the Second Circuit would have it. The FCC, by design, adopted the form and substance of an ordinary commercial lending transaction, and the FCC's actions as a commercial lender give rise to the same set of concerns as all other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process and the need to provide both for the preservation of financially embarrassed but economically viable enterprises and for the protection of their creditors and investors. The Bankruptcy Code provides those protections.

(Cont'd)

> Commission[']s current process of spectrum assignment by lottery and comparative hearings is flawed. This view holds that not only do current licensing procedures often result in arbitrary and inefficient spectrum management decisions, but also, by assigning spectrum to non-federal licensees without receiving compensation, the government is failing to manage wisely one of the nations most valuable national resources.

H.R. Rep. No. 103-111, pt. 2 (1993).

12. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993), amending Section 309 of the Communications Act of 1934 (codified in relevant part at 47 U.S.C. § 309(j)).

By crossing over into the commercial financing arena and requiring successful bidders such as NextWave and UC-NC to pay full commercial value for the PCS licenses and then financing that acquisition, the FCC subordinated itself to the contract and other laws that regulate the affairs of commercial transactions. Put differently, the FCC could not responsibly or reasonably determine that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction — of which the bankruptcy laws is one.

The FCC understands full well that the position it has taken in its litigation with C Block licensees is tenuous. It has lobbied Congress extensively during the pendency of this litigation to obtain an exemption from the Bankruptcy Code for its actions as a commercial lender which it claims to possess already and has sought retroactive application of the statute it has proposed for the purpose of nullifying the actions brought by C Block licensees.[13]

---

13. [Proposed] SEC. 618. Section 309(j)(8) of the Communications Act of 1934 is amended by adding new paragraph (D) as follows:

(D) PROTECTION OF INTERESTS. —

(i) Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships, or any succeeding Federal law not expressly in derogation of this subsection, shall not apply to or be construed to apply to the Commission or limit the rights, powers, or duties of the Commission with respect to (a) a license or permit issued by the commission under the subsection or a payment made to or a debt or other obligation owed to the Commission relating to or rising from such a license or permit,

(Cont'd)

Congress has repeatedly refused to grant the exemption to the FCC.[14]

(Cont'd)

> (b) an interest of the Commission in property securing such a debt or other obligation, or (c) an act by the Commission to issue, deny, cancel, or transfer control of such a license or permit.
>
> (ii) Notwithstanding otherwise applicable law the Commission shall be deemed to have a perfected, first priority security interest in a license or construction permit issued by the Commission under this subsection and the proceeds of such a license or permit for which a debtor or other obligation is owed to the commission under this Subsection.
>
> (iii) This paragraph shall apply retroactively, including to pending cases and proceedings whether on appeal or otherwise.

S. 1217, 106th Cong. § 618 (1999).

14. The proposed amendment (footnote 13, supra) was included in S. 1217, a fiscal year 2000 appropriation bill for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, which was passed by the Senate on July 22, 1999. *See* 145 Cong. Rec. S9068 (July 22, 1999). Under unanimous consent agreement, S. 1217 was not engrossed but ordered to be held until the House companion measure, H.R. 2670, 106th Cong. (1999), was received, and once received H.R. 2670 was to be amended by striking everything after the enacting clause and inserting S. 1217 in lieu thereof, and upon passage of H.R. 2670 by the Senate, S.1217 was to be vitiated and indefinitely postponed. *See* 145 Cong. Rec. S9046 (July 22, 1999). The Senate passed its amended version of H.R. 2670 on September 8, 1999, and passage of S. 1217 was subsequently vitiated and indefinitely postponed. *See* 145 Cong. Rec. S10540 (September 8, 1999); 145 Cong. Rec. D949-50 (September 8, 1999).

(Cont'd)

II. No "Regulatory Purpose" was Served by the FCC's Attempted Forfeiture of the Licenses

After the initial auction of the C Block licenses was concluded in May 1996, but before the licenses were issued by the FCC to the successful bidders and financing could be obtained, the FCC, in June 1996, announced that it would auction three blocks of spectrum (the D, E and F Blocks) in the same BTAs as, and competing with, the C Block licenses.[15]

The ensuing auctions for additional licenses of PCS spectrum, commencing in August 1996 and ending in January 1997,[16] flooded the market for PCS spectrum and drove down the value of PCS licenses. While the successful bids for C Block licenses had averaged $1.33 per MHz-Pop[17] for the

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(Cont'd)

The House version of H.R. 2670, which was passed on August 5, 1999, *see* 145 Cong. Rec. H7383-7384 (August 5, 1999); 1999 House Roll No. 387, did not contain the provision. The bills went to conference, and the provision was not included in the resultant conference report, *see* H.R. Rep. No. 106-398 (1999), which was agreed to by both the House and Senate on October 20, 1999, *see* 145 Cong Rec. D1166 (October 20, 1999). The enrolled bill was presented to the President on October 22, 1999, *see* 145 Cong. Rec. H10768 (October 25, 1999), and vetoed for sundry reasons on October 25, 1999, *see* 145 Cong. Rec. H10835 (October 26, 1999).

15. *See NextWave*, 200 F.3d at 47.

16. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999).

17. $/MHz-Pop is a generally accepted industry measurement standard. *See Next Wave*, 200 F.3d at 47.

(Cont'd)

main auction ending May 6, 1996, and $1.94 per MHz-Pop for a re-auction in July 1996, the average of the successful bids for the new licenses in the same BTAs for which C Block licenses were granted was only $.33 per MHz-Pop.[18] This difference in the bids in identical markets demonstrates that the FCC, by auctioning additional PCS spectrum immediately after the C Block auctions closed and before the licenses had been issued, drastically depressed the market value of all such licenses. Predictably, the C Block licensees found that, in light of the disparate values placed on comparable PCS spectrum licenses, financing for the licenses and the build-out of their PCS systems could not be obtained. In the words of United States Bankruptcy Judge Adlai S. Hardin, Jr.,

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date [May 1999], nearly three years after the 1996 auction and re-auction, less than 10% of the C block

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(Cont'd)

> The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. . . . One 'Pop' represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

Id. at 47 n.4.

18. *NextWave*, 235 B.R. at 284.

> licences awarded by the FCC have been placed in service.[19]

The FCC, recognizing its error, decreed a payment moratorium in order to determine how to remedy the situation it had created. After the expiration of the payment moratorium, however, the FCC decided to insist upon full payment of auction bids for any licenses the license holders chose to keep.[20] The licenses for which the holders, for the reasons mentioned above, were unable to make full and timely payment (a significant portion of those awarded) were scheduled by the FCC for re-auction.

Having first repeated (again without any consideration of the overriding effect of 28 U.S.C. § 1334(b) and 28 U.S.C. § 157) its prior holding that the Bankruptcy Court did not have jurisdiction to review actions taken by the FCC in its regulatory capacity,[21] the Second Circuit accepted the FCC's contention that the FCC had acted in a regulatory capacity when it issued the Public Notice. In the words of the Second Circuit:

> The FCC's decision to re-auction the Licenses [defined] previously granted to NextWave is one that implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy court's deference. Moreover, the regulatory purpose for requiring payment in full — the identification of the candidates having the best prospects for prompt and efficient exploitation of

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19. *Id.* at 286.

20. *NextWave*, 200 F.3d at 48.

21. *In re FCC*, 217 F.3d 125, 135 (2d Cir. 2000).

> the spectrum — is quite obviously served in the same way by requiring payment on time.[22]

In support of that holding, the Second Circuit pointed to the language in its previous decision "detailing the regulatory purpose behind the FCC's general insistence on payment according to the terms set at auction, so that the 'bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue.' "[23]

The plain fact is that the inability of NextWave and those standing in the same position as NextWave to make timely payment of the bid prices for the PCS licenses had nothing to do with any lack of commitment to exploit and make the most of their licenses but had everything to do with the FCC's conduct of the subsequent auctions of PCS spectrum. The C Block licensees failed to raise the necessary financing because the FCC had not been sensitive to the needs of the winning bidders to go into the public markets to raise the necessary capital, a fact inherent in the very criteria by which they were chosen. The FCC knew or should have known when it auctioned the C Block licenses to minimally capitalized small emerging businesses and financed the winning bids, that, by definition, the ability of the winning bidders to pay (i.e., raise the necessary capital in a competitive capital market) would wax and wane with the volatile market for public financing. Nonetheless, the FCC proceeded to conduct subsequent auctions of PCS spectrum with complete disregard of this fact and scheduled subsequent auctions in a manner that virtually assured that the C Block bidders would be unable to raise the necessary capital. The inability to raise the necessary capital and the need for relief under Chapter 11 would have been the experience of any typical small business meeting the eligibility criteria for the C Block

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22. *Id.*

23. *Id.* at 136.

licenses and was, in fact, the experience of many of those who did bid successfully.

The Bankruptcy Court saw clearly that the claimed regulatory purpose for the FCC's cancellation of the licenses was nonexistent. Even assuming *arguendo* that review of true regulatory action is beyond the jurisdiction of the Bankruptcy Court (NextWave has demonstrated in the Petition that it is not), that court had jurisdiction to determine in the first instance whether the action of the FCC was truly regulatory. In holding that the Bankruptcy Court was foreclosed from making that determination by the FCC's contention that its insistence on timely payment was a "regulatory condition,"[24] the Second Circuit disregarded the "primordial element of our jurisprudence . . . that federal courts have jurisdiction to determine whether they have subject matter jurisdiction."[25]

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24. *Id.* at 135.

25. *Shannon v. Shannon*, 965 F.2d 542, 545 (7th Cir. 1992); *see also United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 (1998) (Stevens and Souter, JJ., concurring).

As this brief was going to the printers, the United States Court of Appeals for the Fifth Circuit announced its decision of *In re GWI PCS I Inc. v. United States*, __ F.3d __, 2000 U.S. App. LEXIS 26062 (5th Cir. October 20, 2000), in which that court affirmed decisions of the lower courts avoiding a debtor-licensee's obligation to the FCC. The Fifth Circuit acknowledged that it was within the Bankruptcy Court's jurisdiction to enjoin the FCC from revoking the licenses and avoiding the majority of the obligations under the notes in order to preserve property of the estate and further the reorganization plan, citing 11 U.S.C. § 541. The court also held that 11 U.S.C. § 106 renders the United States and the FCC subject to the bankruptcy proceedings and that 28 U.S.C. §§ 158 and 1334(b) "grant the bankruptcy court jurisdiction to consider the Debtor's avoidance claims," although allowing, by the way of *dictum*, for the possibility that the Bankruptcy Court committed the error of taking unto itself a quasi-regulatory function held by the FCC. *GWI*, 2000 U.S. App. 26062 at 37 and n.29.

III. The Salutary Effect of the Bankruptcy Remedies

In structuring and scheduling the C Block and subsequent license auctions, the FCC's directive from Congress was to ensure that those licenses were awarded to "small, emerging businesses".[26] Unquestionably, the FCC failed in that mission. Of the C Block licences allocated by Congress to small, emerging businesses, precious few have been put into service by such an entity. On the contrary, because of the strategy pursued by the FCC, the C Block licensees found themselves obligated to pay the FCC sums that vastly exceeded the actual market value of those licenses, as demonstrated by the results of the subsequent auctions and the refusal of the financial community to invest capital in C Block licensees. The C Block licensees are in need of a remedy that will place them in the position in which they would have been if the Congressional mandate had been carried out.[27] UC-NC respectfully submits that the

26. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 314 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999).

27. Section 548 of the Bankruptcy Code is one of the most powerful tools available to the bankruptcy trustee. It provides after the fact protection to the debtor's creditors, by undoing a transaction engaged in by the debtor, in which a transfer of the debtor's property was made, or an obligation was incurred by the debtor, which . . . was made while the debtor was in a precarious financial condition, and the transaction did not provide the debtor with a reasonably equivalent value in exchange for the item transferred or the obligation incurred. The statutory language was drafted broadly to encompass virtually any type of transaction. Any act that has the effect of diminishing the value of the debtor's estate from the standpoint of creditors can be subject to a fraudulent transfer analysis.

5 *Collier On Bankruptcy*, ¶ 548.01 (Lawrence P. King ed., 15th ed. revised 2000).

bankruptcy remedies curing post-petition defaults and staying and postponing payments to creditors are perfectly suited to accomplish the Congressional purpose, as they will permit the successful bidders to proceed to build out their systems and start serving the public.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted, and, upon the appeal, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the bankruptcy court had the authority to enjoin the automatic cancellation of 63 wireless telecommunications licenses by the FCC due to the winning bidder's failure to timely pay the winning bid amount.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 217 F.3d 125. The opinion of the bankruptcy court (Pet. App. 30a-100a) is reported at 244 B.R. 253. The appeals court's earlier opinion (Pet. App. 101a-139a), the mandate of which the present opinion enforces, is reported at 200 F.3d 43. A petition for a writ of certiorari from that earlier decision was denied on October 10, 2000 (No. 99-1980).

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. A petition for rehearing was denied on August 23, 2000. The petition for a writ of certiorari was filed on September 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum, 47 U.S.C. 301, and vests in the Federal Communications Commission (FCC or Commission) the authority to grant radio licenses where the agency finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). Accord 47 U.S.C. 309(a).

In 1993 Congress authorized the Commission to grant initial licenses for spectrum dedicated to certain commercial services through "a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1). In Congress's view, a system of public auctions would eliminate unproductive speculation, because those who do not have an immediate plan to put spectrum to valuable use will generally be unwilling to pay for it. "Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993).

Section 309(j) directs the Commission to develop a competitive bidding methodology that, among other things, (1) aids in the "development and rapid deployment of new technologies, products, and services," (2) avoids excessive concentration of licenses, (3) recovers "a portion of the value of the public spectrum resource made available for commercial use," and (4) promotes "efficient and intensive use of the electronic spectrum." 47 U.S.C. 309(j)(3)(A)-(D) (1994 & Supp. IV 1998). Pursuant to that authority, the Commission established a system of simultaneous multiple round auctions for awarding broadband personal communications services (PCS) licenses. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd

5532, ¶ 27 (1994).[1] The Commission concluded that such a system of competitive bidding would best serve the interests identified by Congress. *Ibid.* The Commission explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (internal quotation marks and footnote omitted). Accord 9 FCC Rcd 5532, ¶ 29 (multiple round auctions "increas[e] the likelihood that" licenses will be "acquired by those who value them most highly").

To ensure the integrity of competitive bidding as a system of license allocation, the FCC's auction rules specify that any license grant is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a) (1996). In the case of companies that elect to pay for their licenses in installments, the rules provide that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. 1.2110(e)(4) (1996). Failure to make timely payment triggers automatic cancellation of the license. 47 C.F.R. 1.2110(e)(4)(iii) (1996).

2. Pursuant to the competitive bidding provisions of 47 U.S.C. 309(j) (1994 & Supp. IV 1998), the FCC auctioned 493

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[1] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." 9 FCC Rcd 5532, ¶ 3.

"C Block" broadband PCS licenses in the summer of 1996. Pet. App. 104a.[2] Petitioner NextWave Personal Communications Inc. (NextWave) was declared the high bidder for 63 of those licenses after it submitted winning bids totaling $4.74 billion. *Id.* at 2a.[3] After a delay created by the fact that NextWave's percentage of foreign ownership exceeded regulatory limits, *id.* at 106a, the licenses were issued. *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997). About the same time, NextWave deposited funds sufficient to bring its downpayment up to ten

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[2] For bidding purposes, the FCC divided the spectrum for broadband PCS into six blocks, denominated by the letters "A" through "F." See 9 FCC Rcd 5532, ¶ 6. Each of the A and B block licenses covered one of the 51 Major Trading Areas in the United States and its territories, as identified by the Rand-McNally Commercial Atlas & Marketing Guide; each of the C, D, E, and F block licenses covered one of the 493 Basic Trading Areas identified by the same Guide. *Ibid.* The A, B, and C Block licenses covered 30 MHz of spectrum each; the D, E, and F Block licenses covered 10 MHz of spectrum each. *Ibid.* In accordance with the statute's mandate that the FCC avoid "excessive concentration of licenses" and promote the dissemination of licenses "among a wide variety of applicants," 47 U.S.C. 309(j)(3)(B); see also 47 U.S.C. 309(j)(4)(C) and (D) (1994 & Supp. IV 1998), the C-Block auction was open only to applicants with less than $125 million in gross revenues during the previous two years, and assets totaling less than $500 million at the time of the auction. 47 C.F.R. 24.709(a)(1) (1996). Applicants eligible for the C-Block auction were required to pay only ten percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2), with the remaining balance to be paid in installments over the ten-year license term at below-market interest rates, 47 C.F.R. 24.711(b). For an applicant—such as NextWave—that qualified as a "small business," the interest rate was the rate for ten-year U.S. Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3).

[3] The petition for a writ of certiorari was filed by petitioner NextWave and various affiliated companies; we use the term petitioner to refer to all petitioners.

percent of its winning bids, Pet. App. 106a; see 47 C.F.R. 24.711(a)(2), and executed promissory notes for the remaining 90 percent of its bid. Pet. App. 106a.

The licenses themselves—like the text of petitioner's note and Security Agreement—made it clear that the licenses were conditioned on "full and timely payment of all monies due" and that failure to comply with that requirement "will result in the automatic cancellation of" the licenses. Gov't C.A. App. 58, 60 (NextWave Radio Station Authorization).[4] The Commission's rules made that clear as well. See 47 C.F.R. 1.2110(e)(4) (1996) ("A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations."); *ibid.* ("Following expiration of any grace period without successful resumption of payment * * * or upon default * * * the license will automatically cancel.").

3. At the request of NextWave and other C-Block licensees, on March 31, 1997, the FCC instituted a proceeding to consider whether and to what extent to restructure the obligations of the C-Block licensees; pending the proceeding, it stayed C-Block payment requirements. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16,436, ¶¶ 14-17 (1997). The FCC ultimately adopted several options designed to assist C-Block licensees in restructuring their obligations, but decided against adopting proposals that would "result in a dramatic forgiveness of the debt owed." *Id.* ¶ 19. The Commission ultimately gave licensees until June 8, 1998, to

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[4] NextWave's note stated that the license was "conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan," and that the Commission's "enforcement authority" would not be affected. NextWave's security agreement stated that "its continued retention of the License" was "conditioned on compliance" with all Commission orders and regulations.

elect whether to avail themselves of the options for restructuring their obligations, and until October 29 (at the latest) to resume payments consistent with their June 8 election. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licensees*, 14 FCC Rcd 6571, ¶ 3 (1999).

Petitioner unsuccessfully sought to obtain a stay of the election deadline from the FCC, see *In re Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, 13 FCC Rcd 11,880 (1998), and from the D.C. Circuit, see *NextWave Telecom Inc.* v. *FCC*, No. 98-1255, 1998 WL 389116 (June 11, 1998). Petitioner also filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. At the same time, petitioner commenced an adversary proceeding against the FCC to avoid its $4.7 billion obligation as a constructive fraudulent conveyance under 11 U.S.C. 544(b) (1994 & Supp. IV 1998). Pet. App. 3a-4a. Petitioner did not make an election by the June 8, 1998 deadline; it did not resume making, by October 29, the payments that were an express condition of its licenses; and it made no effort to obtain any agreement or assurance from the Commission as to the effect of its bankruptcy filing. See *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc., et al. Petition for Reconsideration*, FCC No. 00-335, 2000 WL 1262652, ¶¶ 5, 10 (Sept. 6, 2000). Meanwhile, the vast majority of other C-Block licensees made their elections by the deadline and either made payments or lost their licenses through operation of the automatic cancellation rule.

The bankruptcy court held that much of petitioner's payment obligation for the licenses was subject to avoidance as a constructive fraudulent conveyance. Pet. App. 4a. The court therefore reduced the amount that petitioner was

required to pay for the C-Block licenses from the $4.74 billion that had originally been bid, to a little less than $1.023 billion, while at the same time allowing petitioner to retain the licenses during its reorganization in bankruptcy. See *ibid.* The district court affirmed. *Id.* at 4a-5a.

4. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 101a-139a. The court held that the bankruptcy court "had no authority * * * to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the [l]icenses were fraudulently conveyed." *Id.* at 104a. The appeals court ruled that because the FCC, and not the courts, has been vested by the Communications Act with the power to grant and condition licenses for the use of the radio spectrum, it is "beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 121a.

As the court explained, "[t]he FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." Pet. App. 121a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Instead, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* In other words, "[b]y holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 122a. The court

of appeals also held that "the transaction in which the [l]icenses were issued was * * * not constructively fraudulent." *Id.* at 125a.[5] NextWave filed a petition for a writ of certiorari from the appeals court's decision, which was denied on October 10, 2000. See *NextWave Personal Communications, Inc.* v. *FCC*, No. 99-1980 (order denying certiorari).

5. Meanwhile, on December 16, 1999, after the court of appeals had announced its decision but before it had issued its opinion, petitioners filed modifications to their proposed plan of reorganization providing that they would pay their overdue obligation in full and undertake to pay future installment payments as they came due. Pet. App. 8a; see also *id.* at 42a. On January 11, 2000, petitioners "sweetened [their] offer" and proposed paying the present value of the entire winning bid in a single lump sum. *Id.* at 8a-9a; see also *id.* at 42a. The FCC rejected the offer. In objections to petitioners' proposed modifications filed on January 12, the agency explained that the licenses had "automatically cancel[led]," pursuant to its rules, for nonpayment of the winning bid. *Id.* at 9a (citation omitted). The same day the agency issued a Public Notice scheduling the licenses previously held by NextWave for re-auction. *Ibid.* The auction is now scheduled for December 12, 2000. See FCC Public Notice, DA 00-2038 (Sept. 6, 2000).

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[5] Relying on the FCC's rules, the court held that "the close of the auction" marked the time at which NextWave became obligated to pay its bid price. Pet. App. 129a. At that time, the court stated, the value of the licenses was "by definition * * * $4.74 billion, since 'the fair market values of the C-Block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction.'" *Id.* at 126a (citation omitted). And because the "fair market value was $4.74 billion * * * there was no constructive fraud." *Ibid.* Petitioner does not in the present petition seek review of that ruling. See also note 20, *infra*.

Petitioners thereupon filed a motion in the bankruptcy court for a ruling declaring "null and void" the FCC's actions in announcing that the licenses had automatically lapsed. Pet. App. 32a. The bankruptcy court granted petitioners' motion. *Ibid.* The court recognized that "there has been a delay in payment of principal and interest" on petitioners' C-Block obligations. *Id.* at 44a. The court nonetheless held that the FCC's actions in announcing that the licenses had lapsed violated, among other things, the Bankruptcy Code's automatic stay, *id.* at 50a-54a; see 11 U.S.C. 362(a), and contravened the Code's prohibition against discriminatory treatment of debtors by reason of their bankruptcy, Pet. App. 57a-61a; see 11 U.S.C. 525(a).

The bankruptcy court recognized that the court of appeals, in its earlier opinion, had held that the FCC's full payment requirement is regulatory in nature, because it protects the integrity of the auctions as a method of license distribution, and ensures that licenses in fact are granted to the applicant that values them most highly. Pet. App. 82a. But the court declined to infer a regulatory purpose "with respect to the FCC's 'timely payment' requirement." *Ibid.* On the contrary, the court considered "timeliness" to have no "objective other than pure debtor-creditor economics." *Ibid.* See also *id.* at 59a ("The 'timely payment' requirement is purely economic."). In any event, the court questioned "whether there is any regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar the jurisdiction of the Bankruptcy Court from enforcing the Code." *Id.* at 85a. Confirmation of petitioner's plan of reorganization was stayed "pending further order of the Court of Appeals." *Id.* at 87a.

On the FCC's petition, the court of appeals granted a writ of mandamus to enforce its mandate and directed the bankruptcy court to vacate its order. Pet. App. 1a-29a. The

court of appeals concluded that the FCC's decision to hold petitioner to timely as well as full payment was an exercise of the agency's regulatory authority which was beyond the authority of the bankruptcy court to modify. The court of appeals explained that "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 16a. Because "[t]ime of payment and amount of payment are alike functions of value," *ibid.* (citation omitted), "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness," *ibid.*

The court of appeals rejected the bankruptcy court's reliance on the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362(a). The court emphasized that the automatic stay was by its terms inapplicable to actions to enforce a governmental unit's "police or regulatory power." Pet. App. 22a (citing 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998)). It also rejected, as "flatly incompatible with [its prior] mandate," *ibid.*, the bankruptcy court's conclusion that the FCC was simply seeking to "enforce its pecuniary interests," *id.* at 67a.

The court of appeals also stated that, "[a]lthough the bankruptcy court's opinion is stated in terms of whether timely payment is a regulatory condition, the question posed and answered is whether the regulatory condition of timely payment is arbitrary." Pet. App. 19a. However, the appeals court stated, "a regulatory condition is a regulatory condition even if it is arbitrary," and it is only "for a court with power to review the FCC's decisions to say if they are arbitrary or valid." *Ibid.* In this case, the court pointed out, federal statutes provide that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals." *Id.* at 25a (citing 47 U.S.C. 402(a) and (b); 28

U.S.C. 2342). The court of appeals stated that petitioners had filed in the D.C. Circuit and "remain[ed] free to pursue" those challenges to the FCC's actions under non-bankruptcy law. *Id.* at 27a.[6] The court concluded, however, "that the bankruptcy court acted in derogation of this Court's mandate and beyond its statutory jurisdiction when it nullified the FCC's Public Notice." *Id.* at 29a.

ARGUMENT

In *NextWave Personal Communications, Inc.* v. *FCC*, No. 99-1980 (Oct. 10, 2000), this Court denied a petition for a writ of certiorari from the court of appeals' earlier decision in this litigation, which held that the bankruptcy court lacked authority to require that petitioner be permitted to retain its spectrum licenses without satisfying the regulatory requirement that it fully meet its payment obligation. Enforcing its mandate through mandamus, the court of appeals in the present ruling held that its prior ruling also precludes the bankruptcy court from interfering with the FCC's requirement that winning bids be *timely* paid as a condition to holding the auctioned licenses. That decision is

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[6] On February 11, 2000, petitioner filed a petition for review and a notice of appeal of the FCC's Public Notice in the D.C. Circuit, see *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1045, 00-1046 (D.C. Cir.). On June 22, 2000, the court of appeals dismissed the actions as premature because the Commission had not yet ruled on a pending petition for reconsideration filed by petitioner. (On reconsideration, petitioner had both challenged the Second Circuit's conclusion that the licenses had been cancelled by operation of law, and asked the Commission to reconsider the cancellation.) The FCC denied reconsideration on September 6, 2000, *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶¶ 10-26, and petitioner (on September 15, 2000) again filed a petition for review and a notice of appeal. See *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1402, 00-1403 (D.C. Cir.). Petitioner has moved for a stay of the Commission's December 12 auction date pending appeal, or in the alternative for expedited briefing. As of the date of this brief, that motion remains pending in the D.C. Circuit.

correct and does not conflict with the decision of any other court of appeals or this Court. Moreover, the likelihood that the precise issue presented by the petition—whether a bankruptcy court may override the FCC's regulatory rule that a winning bidder's failure to make required installment payments on time results in cancellation of its spectrum licenses—will recur is diminished now that the FCC has eliminated its installment payment program and requires payment in full *before* the license issues. See *In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, FCC No. 00-274, 2000 WL 1140602 ¶ 55 (released Aug. 14, 2000). Accordingly, further review is not warranted.

1. Under the Communications Act, the FCC is vested with authority to grant telecommunications licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a); see also 47 U.S.C. 309(a). Under the statute, the Commission "serve[s] as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication,'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), and is "the expert body which Congress has charged to carry out its legislative policy," *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). Thus, as this Court has recognized, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), and "no court can grant an applicant an authorization which the Commission has refused," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

Section 309(j) of the Act authorizes the Commission to allocate licenses for use of the electromagnetic spectrum through "a system of competitive bidding." 47 U.S.C. 309(j)(1). In promulgating the ground rules for such a system, the FCC proceeded on the premise—shared by

Congress—that auctions would ensure that spectrum is granted to the most efficient and effective user. *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (because "a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services * * * and the efficient and intensive use of the spectrum"); *id.* ¶ 70 ("auction designs that award licenses to the parties that value them most highly will best achieve" statutory goals); H.R. Rep. No. 111, 103d Cong., 1st Sess. 249 (1993) (auctions "will ensure that spectrum is used more productively and efficiently than if handed out for free.").

The FCC's C-Block auction payment rules are an integral part of that allocative mechanism. Under those rules, all licenses are "conditioned upon full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a) (1996), or "full and timely performance of the licensee's payment obligations under the installment plan," 47 C.F.R. 1.2110(e)(4) (1996). Absent such rules, bidders could submit bids that exceed their expected return on the spectrum—thereby obtaining spectrum that other users value more highly than they do—with impunity, undermining the Commission's allocative mechanism. Thus, as the court of appeals recognized in its earlier ruling in this case, the bankruptcy court's decision to permit petitioner to retain 63 broadband PCS licenses despite its refusal to pay what it had bid for them "had more than financial implications," Pet. App. 121a; it displaced the agency's licensing decisions. As the court of appeals explained, "NextWave's inability to follow through on its financial undertakings * * * indicated that under the predictive mechanism created by Congress to guide the FCC,

NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the bankruptcy and district courts "effectively award[ed]" C-Block licenses "to an entity that the FCC determined was not entitled to them" and thereby impermissibly "exercised the FCC's radio-licensing function." *Id.* at 122a-123a. "It is beyond the jurisdiction of a court in a collateral proceeding," the appeals court correctly concluded, "to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 121a.

Those principles apply with equal force where the issue concerns the *timing*, rather than the *amount*, of the required payment. As the court of appeals correctly understood, "[t]ime of payment and amount of payment are alike functions of value." Pet. App. 16a (citation omitted). It has long been recognized that "[t]ime is money," see *Thinking Machs. Corp.* v. *Mellon Fin. Servs. Corp. #1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1022 (1st Cir. 1995), and that a payment tardily made is less valuable than one that is made on time. By the same token, a bidder that is not held to the time limits for payment is free to submit a bid that does not accurately measure the value of the spectrum to it, thereby similarly upsetting the agency's mechanism for allocating spectrum to those who value it the most. As the FCC has explained, "[t]imeliness of * * * payments is a necessary indication * * * that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of services to the public," and serves to discourage "insincere or financially unqualified bidders from 'shopping' a winning bid in order to obtain financing for a down payment." *In re Southern Communications Sys., Inc.*, 12 FCC Rcd 1532, ¶ 6 (1997). See generally *Mountain*

Solutions, Ltd. v. *FCC*, 197 F.3d 512, 517-519 (D.C. Cir. 1999) (upholding FCC's refusal to waive requirement of timely downpayment for C-Block license as not arbitrary or capricious because default, among other things, serves as "an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public"). The court of appeals thus correctly concluded that "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." Pet. App. 16a. See also *ibid.* ("[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness").[7]

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[7] Abrogation of the timely payment requirement, moreover, would undermine the auction program and the FCC's regulations regarding payment for C-Block licenses. In response to requests for emergency relief from NextWave and other licensees, the Commission granted a suspension of payments to all C- and F-Block licensees, but declined to grant further relief because it would undermine the auction mechanism (which is designed to identify the highest-value user) and be unfair to unsuccessful bidders (who may have been willing to make payments that, once the time-value of money is accounted for, were of greater value). *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶¶ 25-26. Moreover, allowing NextWave to avoid making required payments created an opportunity for precisely the sort of speculation that the auction mechanism was designed to avoid. See p. 2, *supra*; H.R. Rep. No. 111, 103d Cong., 1st. Sess. 248 (1993). In this case, NextWave initially refused to pay its full bid amount for its licenses, claiming that they had declined in value to about one-quarter of what it had bid; but now that the market value of those licenses has, in NextWave's view, increased dramatically, NextWave seeks to retain them by offering to pay its full bid amount. In the interim, Congress's goals have been undermined; NextWave has yet to offer a single service to a single customer. *In re Public Notice DA 00-49*, 2000 WL 1262652, ¶ 25; 47 U.S.C. 309(j)(3)(A) and (D) (1994 & Supp. IV 1998) (goal is to promote use of spectrum). Finally, just as surely as NextWave's default on its initial bid (and claim that the licenses were worth only one-quarter of its bid) casts serious doubt on whether it was the bidder that

2. Petitioner does not seriously contest the fact that the FCC's timely payment requirement is an important regulatory feature of its license allocation mechanism.[8] Instead, as in its earlier petition for a writ of certiorari, petitioner contends (Pet. 11-12) that the court of appeals' decision contravenes 28 U.S.C. 1334(b), which vests the district courts (and, by reference, the bankruptcy courts) with "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction *on a court or courts other than the district courts*." 28 U.S.C. 1334(b) (emphasis added). But as the text of the statute indicates—and as this Court has recognized—"Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other '*courts*,' and, of course, an administrative agency * * * is not a 'court.'" *Board of Governors* v. *MCorp Fin. Inc.*, 502 U.S. 32, 41-42 (1991). Accord 1 L. King, *Collier on Bankruptcy* ¶ 3.01[4][a], at 3-17 (15th ed. 2000). Thus, petitioners' attempt to discern a conflict between the decision below and appeals court decisions which have found that 28 U.S.C. 1334(b) "confers bankruptcy-court jurisdiction * * * despite the existence of statutes purporting to grant exclusive jurisdiction to a different court" (Pet. 16), is misguided. The infirmity in the bankruptcy court's decision was not simply that it intruded into the exclusive jurisdiction of the courts of appeals over

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valued the spectrum most highly, its newfound willingness to pay its *original* bid amount *following* an allegedly dramatic increase in the licenses' market value does nothing to alter that concern. A bid made in 1996 and since defaulted on bears no relation to identification of the applicant best qualified to hold the spectrum under the market allocation mechanism intended by Congress.

[8] To the extent petitioner does dispute that issue, the dispute has no continuing importance given the FCC's elimination of its installment payment program. See p. 12, *supra*.

FCC licensing decisions, see 47 U.S.C. 402; 28 U.S.C. 2342, but that it intruded on the powers Congress reserved for the FCC. Indeed, the district court in effect arrogated to itself the FCC's exclusive administrative authority to issue spectrum licenses and set their terms and conditions.[9]

For that reason, there is no conflict between the decision below and the Section 1334(b) decisions cited by petitioner. See Pet. 16-19. The Fifth Circuit's unpublished denial of a stay pending appeal in the litigation over the C-Block licenses awarded to GWI and its subsidiaries, see *In re United States*, No. 98-11123 (Oct. 7, 1998), cited Pet. 18-19, did not resolve the merits of the government's appeal. Moreover, after petitioner filed its petition, the Fifth Circuit addressed the merits of the government's appeal, *United States* v. *GWI PCS 1 Inc. (In re GWI PCS 1 Inc.)*, No. 99-11294, 2000 WL 1528690 (Oct. 20, 2000), and specifically avoided deciding the question on which petitioner seeks review. Instead, as explained below (pp. 28-30, *infra*), the Fifth Circuit resolved the FCC's appeal from an order confirming a reorganization plan by reference to a doctrine called "equitable mootness," which has no application in the present case. Indeed, the

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[9] After the FCC announced that petitioner's licenses had automatically cancelled and that it would re-auction them, petitioner (on February 11, 2000) filed a petition for review and a notice of appeal of the FCC's Public Notice in the D.C. Circuit, see *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1045, 00-1046 (D.C. Cir.). On June 22, 2000, the court of appeals dismissed that suit as premature, because petitioner had a petition for reconsideration pending before the Commission. It is difficult to see how, if the D.C. Circuit lacked jurisdiction because the matter was still pending before the agency, the bankruptcy court could have jurisdiction. To the contrary, any authority granted bankruptcy courts by Section 1334(b) is "concurrent" with the otherwise exclusive jurisdiction accorded to other courts, *MCorp.*, 502 U.S. at 41. Because the D.C. Circuit did not have jurisdiction over the matter here (in light of its continued pendency before the FCC), the bankruptcy court necessarily could not have had "concurrent" jurisdiction.

Fifth Circuit expressly agreed that the district court "possibly erred in permitting avoidance and enjoining the FCC from revoking the * * * debtor's licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC," 2000 WL 1528690, at *9, and stated that, "if the issue were not equitably moot," it "might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment," *id.* at *15 n.31. See also pp. 28-29, *infra*.

The other appeals court decisions upon which petitioner relies all deal with court, not agency, jurisdiction. See Pet. 16-19. Thus, *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569 (Fed. Cir. 1995), cited Pet. 16-17, involved whether the bankruptcy court, rather than the Court of Federal Claims, could hear a government contracts dispute; and *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987), cited Pet. 17, concerned whether the bankruptcy court, rather than the court of appeals, could enforce an order by the Occupational Safety and Health Administration (OSHA) to abate health and safety violations. In *Brock*, moreover, the court of appeals—not the bankruptcy court—adjudicated OSHA's request for enforcement, and it did so under a provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660; it did not purport to act under Section 1334(b). See 829 F.2d at 386. Finally, *In re Town & Country Home Nursing Services, Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991), and *In re University Medical Center*, 973 F.2d 1065, 1073-1074 (3d Cir. 1992), cited Pet. 17-18, both involved the issue of exhaustion of administrative remedies for claims asserted under the Medicare Act. In neither of those two cases was there any contention that the agency involved had acted in a regulatory capacity; to the contrary, the disputes concerned

actions—the withholding or offset of payments—that everyone assumed to be purely financial in nature.[10]

Moreover, even if one were to assume, *arguendo*, that Section 1334(b) accorded the bankruptcy court jurisdiction over the FCC's actions equivalent to that vested in the courts of appeals under the Hobbs Act, 28 U.S.C. 2342, and the Communications Act, 47 U.S.C. 402, any such review would be limited to the deferential, on-the-agency-record, Administrative Procedure Act examination conducted under those Acts. It would not permit the bankruptcy court to decide that the FCC must allow NextWave to retain its licenses without regard to full and timely satisfaction of the payments upon which award of the licenses was conditioned. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952) ("When the court decided that the license should issue without the conditions [imposed by the agency], it usurped an administrative function," and power to review orders "is not power to exercise an essentially administrative function."). Yet that is what the bankruptcy court attempted to do here.

Indeed, the district court's attempt to order that petitioner retain the licenses directly contravened the Communications Act. Section 301 of that Act expressly declares that no "license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301. In this case, the licenses—by their express terms—were conditioned on full and timely payment of the winning bid amounts, and unequivocally stated that failure to meet that

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[10] *In re Gruntz*, 202 F.3d 1074, 1083 (9th Cir. 2000), similarly does not create a conflict regarding the scope of Section 1334(b). See Pet. 18. In that case, the Ninth Circuit merely rejected the argument that Section 1334(b) confers jurisdiction on (*i.e.*, is an affirmative grant of authority to) state courts to grant relief from the automatic stay. See 202 F.3d at 1082-1083.

condition would cause the licenses' automatic cancellation.[11] The FCC's regulations made that clear as well. 47 C.F.R. 1.2110(e)(4)(iii) (1996) ("Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the *license will automatically cancel.*") (emphasis added). See also p. 5 & note 4, *supra*. The district court had no authority to order that petitioner be permitted to retain the licenses in contravention of the licenses' express terms and conditions. Cf. *In re Gull Air, Inc.*, 890 F.2d 1255, 1261-1262 (1st Cir. 1989) (court could not, under bankruptcy law, preserve rights granted by the FAA where those rights expired by operation of law); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (bankruptcy law does not create property rights where they would not otherwise exist), cert. denied, 469 U.S. 982 (1984).[12]

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[11] The licenses, in fact, could not have been clearer: "This authorization *is conditioned upon the full and timely payment* of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the *automatic cancellation* of this authorization." Gov't C.A. App. 58, 60 (NextWave Radio Station Authorization) (emphasis added).

[12] Petitioner also errs in asserting (Pet. 21) that the court of appeals' decision permits agencies to escape bankruptcy court jurisdiction merely by characterizing their decisions as "regulatory." Under the court of appeals' decision, the bankruptcy court did have jurisdiction to determine whether or not the FCC's rules were regulatory. The court of appeals merely—and correctly—reversed the bankruptcy court's resolution of that issue. See Pet. App. 15a-17a. Nor is petitioner correct to argue (Pet. 20-22) that the court of appeals' decision will necessary have a broad impact with respect to many statutes according particular courts exclusive jurisdiction. The court of appeals' initial decision in this case was quite clearly premised, and relied extensively, on the unique and exclusive role the FCC has in regulating the allocation of spectrum and radio licenses. See Pet. App. 113a-121a. See also *id.* at 7a-8a. So too does the current

3. Petitioner also renews the contention (Pet. 14) that the decision below is "inconsistent with" 28 U.S.C. 1334(e), which provides the district courts (and again, the bankruptcy courts by reference) with jurisdiction over "all of the * * * property of the estate." As petitioner concedes, however, the court of appeals "did not expressly address whether FCC licenses are property of the estate for bankruptcy purposes." Pet. 14. It is therefore hard to see how the decision can be taken as binding authority on point (or as creating a conflict for that matter).

Besides, spectrum licenses are not property—much less property of the estate—vis-à-vis the FCC's exercise of regulatory authority, and petitioner cites no appellate decision holding otherwise. As this Court has long recognized, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The statute "provide[s] for the use of [radio] channels, but not the ownership thereof," and states expressly that "no [radio] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301. When Congress authorized a system of competitive bidding, it made clear that the same rule would apply: Nothing in Section 309(j), Congress specified, shall "diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses," or "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses." 47 U.S.C. 309(j)(6). In short, "[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 394 (1969).

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opinion, which enforces the prior decision on mandamus. See *id.* at 14a-19a.

Petitioner nonetheless points to several cases that, in its view, "hold[] or assum[e]" that FCC licenses are property of the estate. Pet. 14. But none of those decisions suggests that the bankruptcy court thereby acquires the power to interfere with the *FCC's* regulatory authority when it comes to licensing.[13] Thus, *In re Tak Communications, Inc.*, 985 F.2d 916, 917-919 (7th Cir. 1993), cited Pet. 14, concerned an effort by private creditors to obtain a lien on an FCC license. The court of appeals, moreover, *refused* to allow a security interest in a broadcast license, emphasizing that "[w]hether to permit such interests is * * * a matter for the FCC rather than the courts to decide." *Id.* at 919. Similarly, in both *In re Central Arkansas Broadcasting Co.*, 68 F.3d 213, 214-215 (8th Cir. 1995), and *In re Atlantic Business & Community Development Corp.*, 994 F.2d 1069, 1071 (3d Cir. 1993), cited Pet. 14, the licenses at issue had been transferred with FCC approval; as a result, the FCC's regulatory interests were no longer at issue. Neither case suggests that the bankruptcy court may consider an FCC license to be "property of the estate" as against the FCC's assertion of regulatory authority.

Finally, there is serious reason to doubt that the "property of the estate" question is properly presented by this petition. Even if petitioner's interest in its license could have been, at some point, characterized as property of the estate, that characterization does not permit the bankruptcy

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[13] The FCC long has taken the position that, even if spectrum licenses may provide licensees with rights vis-à-vis other private parties, Section 301 bars licensees from claiming that a license accords them any right in the nature of property against the FCC itself. See *In re Application of Bill Welch*, 3 FCC Rcd 6502, ¶ 11 (1988) (noting that, although Section 301 does not preclude for-profit sales of licenses subject to FCC approval, it does ensure that "the Federal Government retain[s] ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees"); *id.* ¶ 13 (Section 301 restriction relates "to a licensee's rights vis-a-vis the Federal Government").

court to expand the scope of the property right in the name of preserving it. As explained above, petitioner lost any proprietary interest in its licenses when they automatically lapsed following petitioner's failure to meet the timely payment requirement. Thus, whether or not petitioner's interest in the licenses was ever "property of the estate," petitioner ceased to have any interest in the licenses upon their automatic cancellation. In that respect, the First Circuit's decision in *Gull Air* is on-point. In *Gull Air*, the debtor claimed that landing slots, issued by the FAA, were property of the estate. The debtor, however, failed to meet a requirement for retention of those landing slots, resulting in their automatic withdrawal. The First Circuit concluded that, "[r]egardless of whether" the debtor's "proprietary interest * * * rises to the level of 'property of the estate,'" the bankruptcy court could not control slot allocation following the debtor's default because the debtor had "lost its limited propriety interest by its failure to satisfy a qualifying condition." *Gull Air*, 890 F.2d at 1261. The same thing is true here.[14]

4. Alternatively, petitioner claims the court of appeals' decision is inconsistent with a variety of other Bankruptcy Code provisions, including 11 U.S.C. 106(a) (addressing bankruptcy court authority to decide bankruptcy law issues

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[14] Nor does the Fifth Circuit's ambiguous reference to "property of the estate" in footnote 29 of its *GWI* decision create a conflict. As noted above (p. 18, *supra*), the Fifth Circuit expressly stated that it might agree with the Second Circuit that bankruptcy courts exceed their authority when they interfere with the FCC's regulatory licensing decisions, and it is not clear whether the property of the estate to which the Fifth Circuit referred was the licenses, possible financing, or the money to be paid for the licenses. Moreover, in *GWI*, the debtor did not miss any payments, and the debtor obtained express judicial approval for its payment program. As a result, in *GWI*, the issue of automatic cancellation never arose. Here, in contrast, petitioner made no payments and its licenses automatically lapsed.

relating to "governmental units"), 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998) (the automatic stay provision), and 11 U.S.C. 525(a) (proscribing governmental discrimination against bankrupt entities). The decision below, however, did not expressly address many of those provisions; petitioner does not claim that the decision conflicts with the decision of any other court of appeals addressing those provisions; and petitioner's claims of error are wholly without merit in any event.

a. Petitioner asserts (Pet. 12-13) that the court of appeals' decision "nullifies" 11 U.S.C. 106(a), which provides that the bankruptcy court may hear and determine issues arising under specified sections of the Bankruptcy Code even where the matter relates to "governmental units." But that provision merely waives the government's sovereign immunity with respect to particular issues. See 11 U.S.C. 106(a) ("sovereign immunity is abrogated as to a government unit to the extent set forth in this section"). It does not purport to effect a wholesale transfer of responsibilities and powers from expert federal administrative agencies to federal bankruptcy courts.

Consistent with that, the court of appeals never held that the bankruptcy court "lacked jurisdiction over every aspect of the relationship between the FCC and NextWave." Pet. App. 123a. To the contrary, the court of appeals' initial decision made clear that, "[t]o the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors" and subject to bankruptcy court authority. *Ibid.* Thus, the court stated, "[i]f the [l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt." *Id.* at 124a-125a. (Indeed, it was for

that reason that the court of appeals addressed the fraudulent conveyance issue, since it might affect the amount of NextWave's potentially dischargeable obligations to the FCC following the cancellation of the licenses. See *ibid.*) The fact that the Bankruptcy Code may vest the bankruptcy court with authority to address the agency's claim—*i.e.*, its demand for money from the estate—does not empower the bankruptcy court to exercise the agency's federal administrative and regulatory authority over the allocation of spectrum licenses.

Indeed, the Bankruptcy Code specifically recognizes the propriety of actions taken by a "governmental unit" to enforce its "police or regulatory power" by expressly excepting such actions, under 11 U.S.C. 362(b)(4) (1994 & Supp. IV 1998), from the reach of the automatic stay. And as the court of appeals correctly concluded in this case, the FCC is "[u]ndoubtedly * * * a governmental unit that is seeking 'to enforce' its 'regulatory power.'" Pet. App. 22a. For the same reasons, petitioner's further assertion (Pet. 13 n.7) that the decision conflicts with the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362 (1994 & Supp. IV 1998), is devoid of merit; the regulatory actions at issue here lie at the core of the exemption provided by Section 362(b)(4). Moreover, because the licenses became cancelled automatically by operation of law, their cancellation does not constitute "an administrative action or proceeding against the debtor falling within the purview of section 362(a)(1) of the Bankruptcy Code." *Gull Air*, 890 F.2d at 1263.

b. Contrary to petitioners' argument (Pet. 13-14), the decision below also does not contravene (much less make a "mockery of") 11 U.S.C. 525(a). As Section 525(a)'s heading ("Protection against discriminatory treatment") and full text attest,[15] Section 525 "protects bankruptcy debtors from

[15] In relevant part, Section 525(a) declares that, except as provided in certain statutes, "a governmental unit may not deny, revoke, suspend, or

various forms of *discrimination* based upon the filing [of] a bankruptcy case, insolvency prior to a bankruptcy case or nonpayment of a debt that was discharged in a bankruptcy case." 4 *Collier, supra,* ¶ 525.01, at 525-3 (emphasis added). By its terms, the provision declares that "a governmental unit may not * * * revoke * * * a license * * * *solely* because [the] debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. 525(a) (emphasis added). Consequently, where an agency merely enforces a nondiscriminatory financial requirement—one that is applicable whether or not a party has filed for bankruptcy—such as requiring "financial responsibility in a particular licensing process," Section 525(a) "is not applicable." 4 *Collier, supra,* ¶ 525.02, at 525-5. See S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) (Section 525 "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.").[16]

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refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title * * * solely because such bankrupt or debtor is or has been a debtor under this title * * * has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act." 11 U.S.C. 525(a).

[16] The House Report explains that, "where the causes of a bankruptcy are intimately connected with the license * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977).

That precisely describes the FCC's nondiscriminatory timely payment requirement. Under the FCC's rules, all licensees lose their spectrum rights upon failure to make full and timely payments—whether or not they file for bankruptcy—because nonpayment "indicate[s] that under the predictive mechanism created by Congress to guide the FCC, [they are] not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted," Pet. App. 121a, and because default serves as "an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public," *Mountain Solutions*, 197 F.3d at 518.[17]

Section 525, moreover, applies only where the governmental action is based on a failure to pay "a debt that is dischargeable" in the bankruptcy case. 4 *Collier*, *supra*, ¶ 525.02, at 525-5; *e.g.*, *Johnson* v. *Edinboro State Coll.*, 728 F.2d 163, 165 (3d Cir. 1984). In this case, a licensee's full and timely payment of its winning bid installments is an essential condition of its license grant; payment thus is a regulatory requirement, not a dischargeable debt. Indeed, the court of appeals specifically held that, so long as the licensee retains the licenses, the payment obligation (like all other license terms) is not subject to modification or discharge in bankruptcy. See pp. 7-8, 10, *supra*. Because the license payment

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[17] Petitioner's claim that Section 525(a) should provide "meaningful protection against federal agency license revocations" is thus misleading. Pet. 13. Section 525 is not designed to give licensees in bankruptcy greater rights in their licenses than the rights held by non-bankrupt entities. Nor is it designed to permit licensees to retain licenses in bankruptcy notwithstanding their failure to meet regulatory requirements. Instead, Section 525 is designed to codify this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971), by barring *discrimination* that would otherwise interfere with the Bankruptcy Code's fresh start policy. See 4 *Collier*, *supra*, ¶ 525.02, at 525-4. The license cancellation at issue here has no effect on that substantive bankruptcy policy.

obligation is not a *dischargeable* debt in bankruptcy while the license is held, Section 525(a) by its terms does not apply.[18]

5. Finally, we note that, on October 20, 2000, the Fifth Circuit issued a decision in *GWI PCS 1 Inc.*, No. 99-11294, 2000 WL 1528690. Although that decision rejected the government's challenge to a confirmed plan of reorganization and allowed a C-Block bidder to retain 14 broadband PCS licenses while avoiding much of the debtors' bid obligation, the decision does not directly conflict with the decision below on the issue raised in the petition. Indeed, in *GWI*, the Fifth Circuit rejected the government's challenge to the bankruptcy court's confirmation order not because it disagreed with the Second Circuit's decision in this case, but rather because it found that the government's challenge to the bankruptcy court's ruling had become "equitably moot." That doctrine, the court stated, permitted it to "decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available—even though there may still be a viable dispute between the parties on appeal." 2000 WL 1528690, at *5 (citing *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994), cert. denied, 513 U.S. 1152 (1995)). As the Fifth Circuit recognized, 2000 WL 1528690, at *9, equitable mootness principles have no application to the present case, because petitioners' plan of reorganization was never

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[18] Nor can it be claimed that the court of appeals' decision effectively forces parties like petitioner to violate the automatic stay. The license payments were exempted from the automatic stay as payments in the "ordinary course of business." See 11 U.S.C. 363; *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997). Moreover, petitioner could have sought court authorization to make the payments under 11 U.S.C. 363(b)(1). See, *e.g.*, *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1227 (5th Cir. 1986) (approving use of estate funds to pay airplane leases where new aircraft would permit debtor to exploit value provided by commercial air routes).

confirmed. Moreover, as noted above, the Fifth Circuit suggested that it might well have agreed with the Second Circuit in this case if the issue were not equitably moot. The Fifth Circuit specifically observed that the bankruptcy court had "possibly erred in permitting avoidance and enjoining the FCC from revoking the * * * debtor's licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC," *id.* at * 9, and added that, "if the issue [before it] were not equitably moot," it "might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment," *id.* at *15 n.31.[19]

To be sure, the Fifth Circuit's decision in *GWI* permits a C-Block bidder to retain PCS licenses without satisfying the condition of full and timely payment of the bid amount upon which the licenses were awarded. For that reason, we believe that the decision is difficult to reconcile with fundamental Communications Act principles. But, unlike petitioner, the debtor in *GWI* did not miss any payment deadlines, and sought and obtained judicial approval for a specific payment plan; as a result, the issue of automatic cancellation never arose. Moreover, the Fifth Circuit's rationale for its decision—equitable mootness—is by its terms inapplicable to cases like this one, in which there is no confirmed plan.

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[19] In light of those statements, the court of appeals' reference to Section 1334(b) in footnote 29 of its decision hardly creates a conflict. Based on a perceived concession by government counsel, 2000 WL 1528690, at *9, the Fifth Circuit read the Second Circuit's decision as relating not to the bankruptcy's court's *jurisdiction* but rather to its *authority*. Compare Pet. App. 104a (Second Circuit describing decision as "hold[ing] that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses."). For present purposes, the distinction between the bankruptcy court's authority to set aside the FCC's spectrum licensing decisions and its jurisdiction to do so is immaterial. Regardless of how the matter is characterized, in this case the bankruptcy court erred by arrogating to itself spectrum licensing powers that Congress reserved for the FCC.

Accordingly, any decision by this Court in the present case would be unlikely to alter the result in *GWI*, and that decision adds no weight to petitioner's request for further review.[20]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2000

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[20] Because the GWI reorganization order "preserved certain challenges to the valuation of the licenses and the amount of * * * the FCC's claim," 2000 WL 1528690, at *9, the Fifth Circuit addressed (and upheld) the substance of the bankruptcy court's avoidance judgment. In doing so, the court expressly "disagree[d]" with the Second Circuit's conclusion in this case that the companies that submitted winning bids in the C-Block auction "became obligated to pay the FCC the full bid price at the close of the auction." 2000 WL 1528690, at *12. Any conflict on that issue between the two courts of appeals is not presented by this petition, which raises only the issue of the bankruptcy court's jurisdiction over the FCC's license award, and not the substance of the bankruptcy court's fraudulent conveyance analysis. Pet. i (Question Presented). Petitioner's earlier petition for a writ of certiorari, No. 99-1980, by contrast did raise the issue, and this Court denied the petition on October 10, 2000.

(4)

No. 00-447

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF PROFESSOR KENNETH N. KLEE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The undersigned amicus curiae is Acting Professor of Law at the University of California at Los Angeles School of Law and is active in the study and teaching of bankruptcy law.[1] The undersigned respectfully submits this brief in support of the petition, dated September 21, 2000, of NextWave Personal Communications Inc., NextWave Partners Inc., NextWave Power Partners Inc., Next Wave Wireless Inc. and Next Wave Telecom Inc. (collectively, "NextWave") for a writ of certiorari to review the judgment of United States Court of Appeals for the Second Circuit (the "Second Circuit"), dated May 25, 2000, granting an extraordinary writ of mandamus against the United States Bankruptcy Court for the Southern District of New York (Hon. Adlai S. Hardin, Jr., U.S.B.J.) (the "Bankruptcy Court") filed by the Federal Communications Commission (the "FCC"). The undersigned has received the written consent of counsel of record to the parties to the submission of this amicus curiae brief. Copies of the letters granting such consent have been lodged with this Court.

The undersigned respectfully submits that the Second Circuit's decision granting the FCC's petition is wholly inconsistent with governing statutory law and the case law of this and other Courts, and as a result, has rendered the jurisdictional provisions of the Judicial Code, 28 U.S.C. § 1334(b) and (e), and the most fundamental provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), meaningless.

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[1] As required by Rule 37.6, I have authored this brief in its entirety and no party has made a monetary contribution for its preparation or submission.

II. SUMMARY OF ARGUMENT

By finding that the Bankruptcy Court did not have jurisdiction to enter the various orders with respect to the wireless PCS spectrum licenses (the "Licenses") purchased by NextWave, the Second Circuit disregarded the application of the Bankruptcy Code and the specific jurisdictional grants under federal statutory law in their entirety. Absent a Congressional mandate, the regulations promulgated under the Federal Communications Act (the "FCA") do not trump the basic statutory protections contained in the Bankruptcy Code. If the Second Circuit's decision stands, any federal agency, such as the FCC, could entirely avoid application of federal bankruptcy law notwithstanding its status as a creditor. This result would deprive debtors and their other creditors of the most fundamental and important protection of the Bankruptcy Code, the automatic stay. Such a result would undermine the role of Congress and the Bankruptcy Code itself, effectively overturning Congress's scheme with respect to the administration of a debtor's bankruptcy estate.

The Constitution grants Congress the power to establish: "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. With the Bankruptcy Act of 1898, Congress began the modern development of the rights and obligations of parties in bankruptcy cases and proceedings. In that process Congress continually weighed a variety of competing public and private interests which are clearly reflected in the fabric of the current Bankruptcy Code. In those limited instances in which Congress intended to elevate specific policy interests above the fundamental policies of a "fresh start" for debtors and equality of distribution among creditors, it did so explicitly.

The automatic stay provision under section 362(a) of the Bankruptcy Code is the most fundamental protection afforded under federal bankruptcy law to a debtor in possession, and its rights in property. Subject to certain exceptions, Congress squarely determined that, upon filing for protection under the Bankruptcy Code, all debtors should benefit from an automatic stay of all collection efforts on prepetition debts. Moreover, Congress has repeatedly stated that the narrow exceptions provided should be limited to certain specifically enumerated instances in which particular interests must prevail over the rights of a debtor.

For example, under the exception set forth in section 362(b)(4), the government may take certain actions, notwithstanding the automatic stay, under its "police and regulatory" authority, but only as are necessary to preserve or promote public health or safety. Nothing in that provision or in the FCA remotely suggests that the FCC may retroactively enforce its own pecuniary regulations to terminate the Licenses in violation of the automatic stay.

By finding that the Bankruptcy Court cannot apply the most fundamental bankruptcy protections to holders of federally issued licenses, the Second Circuit has effectively determined that every federal agency can now achieve arbitrarily by its own regulation what Congress has specifically prohibited by statute. A regulatory agency's unfettered right to interpret not only its own rules, but also bankruptcy law retroactively and, thus, to terminate a licensee's rights to property, denies virtually any regulated companies the right to reorganize at all. Nothing in the FCA overrides these fundamental principles of the Bankruptcy Code. In a very recent decision, the Court of Appeals for the Fifth Circuit upheld confirmation of a chapter 11 plan based on the ownership of identical licenses and identified them as

property of the debtors' bankruptcy estates thereby affording their holders the Bankruptcy Code's fundamental protections. See F.C.C. v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.), 2000 WL 1528690 (5th Cir. October 20, 2000).

Ultimately, the Second Circuit has upset and dismantled the balance of the rights and obligations of debtors and creditors creating a manifest and palpable injustice. Neither the Bankruptcy Code nor the FCA should be interpreted to permit the FCC to cancel more than $4.7 billion of Licenses for the sake of a single post-bankruptcy interest payment that the Bankruptcy Code allows NextWave to cure. Thus, NextWave's petition for certiorari should be granted.

III. ARGUMENT

A. The Second Circuit's Decision Effectively Seizes Congress's Exclusive Power to Legislate.

The power to establish uniform laws regarding bankruptcy resides, not with the FCC, but exclusively with Congress. See U.S. Const. art. I, § 8, cl. 4. The singular importance of the Constitutional separation of powers, establishing Congress's exclusive power to enact legislation, is fundamental to our jurisprudence:

> When the legislative and executive powers are united in the same person or body, . . . there can be no liberty . . . . No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty . . . . [W]here the whole power of one department is exercised by the same hands which possess the whole power of

> another department, the fundamental principles of a free constitution are subverted.

James Madison, The Federalist No. 47, pp. 303, 324, 325-26 (J. Cooke ed. 1961). Similarly, Justice Douglas many years later wrote:

> In some nations [legislative] power is entrusted to the executive branch as a matter of course . . . . We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 630 (1952) (Douglas, J., concurring) (emphasis in original).

Under the Second Circuit's decision, the FCC, an agency of the executive branch, may per se legislate an exception to the Bankruptcy Code that simply has not been enacted by Congress. Accordingly, the FCC's conduct in these cases contravenes the specific Constitutional grant of power and the basic principle of separation of powers. See generally Freeman v. City of Mobile, 193 F.3d 1179 (11th Cir. 1999) (agency cannot supplant an act of the legislature).

The Bankruptcy Code provides that the debtor and its property are entitled to the benefit of a broad

automatic stay of any effort to collect prepetition debts or to seize the debtor's property once bankruptcy protection is sought. 11 U.S.C. § 362(a). The automatic stay, which is at the heart of the Bankruptcy Code, has certain specific and limited exceptions enacted by Congress to further certain competing public policy concerns. See 11 U.S.C. § 362(b). By depriving the Bankruptcy Court of the ability to enforce the provisions of the Bankruptcy Code, the Second Circuit granted the FCC the unfettered ability to terminate retroactively the Licenses solely in response to nonpayment of prebankruptcy amounts due despite the pending bankruptcy stay.

Congress refused to include in either the Telecommunications Act of 1993, or any other legislation, an exception to the automatic stay that would have entitled the FCC unilaterally to terminate the Licenses.[2] The FCC simply cannot point to any law that would permit it to terminate the Licenses if bankruptcy law was properly applied in the instant case. If bankruptcy law were applied correctly, the FCC's own regulations would be unenforceable in this context.

Courts have stated time and again that the Constitution does not permit an executive agency, either

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[2] In its report to Congress on spectrum auctions, dated October 9, 1997, the FCC asked Congress "to adopt legislation that would clarify that provisions of the bankruptcy code (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations; and (3) do not affect the Commission's authority to revoke, cancel, transfer or assign such licenses." FCC Rep. No. 97-353, WT Docket No. 97-150, 1997 WL 629251 (Oct. 9, 1997). The requested legislation was not adopted.

by enacting a regulation or interpreting its own regulations, to circumvent the intent of Congress. See Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) ("[A] rule out of harmony with the statute, is a mere nullity."); Bukala v. United States, 854 F.2d 201, 203 (7th Cir. 1988) ("[A]n agency's interpretation of a statute, as evidenced by its lawfully promulgated rules and regulations, cannot supersede statutory language . . . ."); United States v. Gordon, 638 F.2d 886, 888 (5th Cir.) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute . . . ."), cert. denied, 452 U.S. 909 (1981); Furlow v. United States, 55 F. Supp. 2d 360, 364 (D. Md. 1999) ("It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations.").

As NextWave points out in its petition, the Second Circuit's finding that the Bankruptcy Court lacked jurisdiction to make a determination with respect to the Licenses ignores specific grants of jurisdiction pursuant to federal statute as well as case law of this Court and others. Indeed, the Fifth Circuit recently found that the FCC could not avoid application of federal bankruptcy law with respect to wireless PCS licenses similar to NextWave's stating, "[t]he bankruptcy court's enjoining the FCC from revoking the licenses and avoiding the majority of the obligations under the notes was within its jurisdiction to preserve property of the estate." GWI, 2000 WL 1528690 at *15 n. 29.

Furthermore, the Second Circuit improperly elevated the FCC's after-the-fact interpretation of its own regulations over statutory authority. As the Fifth Circuit noted, the FCC's view of the law is not entitled to such deference, "in circumstances such as these, where an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation

position for the agency, we have declined to defer to the interpretation." GWI, 2000 WL 1528690 at *10. Where, as here, the FCC's interpretation came after the litigation in the bankruptcy proceeding commenced, no special deference should be accorded. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); see also Chrysler Corp. v. Brown, 441 U.S. 281, 317 (1979) ("Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position and the nature of its expertise."). The FCC cannot be allowed to change the law retroactively based upon its own after-the-fact interpretation. This Court should grant NextWave's petition.

B. The Automatic Stay Prevents the FCC from Attempting to Cancel or Terminate the Licenses.

Section 362(a), the automatic stay provision of the Bankruptcy Code, protects the property of the debtor, as well as the debtor itself, from creditor collection efforts during the pendency of the debtor's bankruptcy case as well as providing the debtor a "fresh start".

> To determine if conduct is subject to the automatic stay, three factors must be considered: (1) whether one of section 362(a)'s subsections describes the conduct in question; (2) whether the conduct affects the debtor, property of the debtor or property of the estate;[3] and (3) whether the

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[3] Notwithstanding the Second Circuit's failure to address this issue, it is undeniable that the Licenses are property of the debtors' estates under section 541 of the (continued...)

conduct relates to a pre-petition or post-petition claim.

1 Chapter 11 Theory and Practice, § 8.01 (Queenan, Hendel, Hillinger, eds. 1998). By deciding that the

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[3] (...continued)
Bankruptcy Code. The great weight of authority establishes that a license that has been granted to a debtor by a governmental agency constitutes property of the debtor's estate. See, e.g., Ramsay v. Dowden (In re Central Ark. Broad. Co.), 68 F.3d 213, 214 (8th Cir. 1995) (radio station operating license granted by the FCC); In re Neiberger, 934 F.2d 1300, 1302-03 (3d Cir. 1991) (holding that the mere possibility of renewal of a state liquor license that had expired pre-petition constituted property of a debtor's estate); State of California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.), 792 F.2d 1400, 1402 (9th Cir. 1986) (state liquor license); In re Kansas Personal Communications Servs., Ltd., 252 B.R. 179, 194 (Bankr. D. Kan. 2000) (holding that FCC C-block licenses are property of estate). Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 869-71 (Bankr. S.D.N.Y. 1990) (holding that FCC license constitutes property of a debtor's estate), aff'd, 124 B.R. 421 (S.D.N.Y. 1991). Ultimately, "[a] broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury." L.B. Wilson, Inc. v. F.C.C., 170 F.2d 793, 798 (D.C. Cir. 1948); see also Jefferson-Pilot Corp. v. Commissioner, 98 T.C. 435, 445 (1992) (holding that "[t]he economic reality is that an FCC license represents a valuable asset to its holder . . . . [A]n FCC license represents the valuable right of entry into the broadcasting market for a particular area. FCC licenses are, subject to approval by the FCC, bought and sold."), aff'd, 995 F.2d 530 (4th Cir. 1993) (citations omitted).

Consequently, the bankruptcy court has jurisdiction over such property pursuant to 28 U.S.C. § 1334(b) and (e).

Bankruptcy Court is without jurisdiction to decide the issues relating to the Licenses, the Second Circuit has allowed the FCC to cloak in regulatory garb its efforts to repossess NextWave's property, to the detriment of all other creditors, solely to satisfy its claims.

The statutory protection afforded by section 362(a) is axiomatic. The legislative history of section 362(a) speaks unambiguously:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49-51 (1978).

Other courts of appeals have given great deference to the stay and accorded it unmatched importance. As the Court of Appeals for the First Circuit stated:

> "[T]he dead tree gives no shelter." T.S. Eliot, The Waste Land, I, The Burial of the Dead (1922). Like a shade tree, the automatic stay which attends the initiation of bankruptcy proceedings, 11 U.S.C. § 362(a) (1994), must be nurtured if it is to retain its vitality.

Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 971 (1st Cir. 1997).[4]

Indeed, notwithstanding its summary dismissal of the Bankruptcy Court's jurisdiction in the instant cases, the Second Circuit had explicitly recognized the importance of the automatic stay in the face of a similar attempt post-bankruptcy by a governmental agency to encumber assets of a debtor on account of pre-bankruptcy claims. See Lincoln Sav. Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Assoc., Inc.), 880 F.2d 1540, 1545 (2d Cir. 1989), cert. denied, 493 U.S. 1058 (1990). In that case, the Second Circuit rejected Suffolk County's argument that, because a tax lien on the debtor's property arose post-petition "by operation of law" and without an affirmative act, the perfection of the lien did not violate the automatic stay, commenting:

> The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment by ensuring that no creditor receives more than an equitable share of the bankrupt's

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[4] In fact, in Soares, the Court of Appeals specifically noted that "retroactive relief from the automatic stay must rest on facts that are unusual and unusually compelling." Id. at 977. Ultimately, the Court of Appeals found that retroactive relief from the stay would only be warranted where the creditor could demonstrate that (i) it had no knowledge of the pending bankruptcy case when the creditor took action to pursue its claim or (ii) the debtor acted in bad faith. Id. at 978. The FCC has never offered any such allegations or evidence of bad faith in the instant cases that could have mandated or justified the retroactive relief it sought.

> estate. This equitable treatment requires that all creditors, both public and private, be subject to the automatic stay.

Id. (emphasis added) (citations omitted).

Ironically, the very argument rejected by the Second Circuit in Parr Meadows is the same argument the Second Circuit has now upheld here under the guise of regulatory action. That is, the government can take any steps it deems necessary in the face of the automatic stay to collect pecuniary obligations owing to it if that governmental entity can manufacture a purported regulatory objective for its debt collection action.

Ultimately, the essential purpose of the automatic stay under section 362(a) is to preserve the utility of other provisions of the Bankruptcy Code: in chapter 11 these provisions are designed fundamentally to facilitate a debtor's reorganization. See United States v. Energy Resources Co., 495 U.S. 545, 551 (1990) (holding when necessary for reorganization, Bankruptcy Code trumps conflicting sections of Internal Revenue Code). Among these essential provisions is the debtor's right to cure defaults under sections 1123(a)(5)(G) and 1124(2)(A) as part of the plan confirmation process. See Florida Partners Corp. v. Southeast Co. (In re Southeast Co.), 868 F.2d 335, 337-38 (9th Cir. 1989); Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber Supply, Inc.), 850 F.2d 1338, 1342 (9th Cir. 1988) (stating that "[i]t is clear that the power to cure under the Bankruptcy Code authorizes a plan to nullify all consequences of default"). As the Second Circuit succinctly stated in DePierro v. Taddeo (In re Taddeo), 685 F.2d 24, 27 (2d Cir. 1982), "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified." Therefore, assuming

that NextWave, in fact, defaulted on payment obligations during the pendency of the bankruptcy cases due to their reliance on section 362(a)'s automatic stay and the FCC's affirmative statements in the record regarding its applicability, NextWave has the right (and indeed has proposed in its chapter 11 plan) to cure any such default and reinstate the indebtedness pursuant to a chapter 11 plan of reorganization.

The FCC's determination, in its sole discretion, that NextWave's failure to pay the obligations timely terminated the Licenses by "operation of law" directly contravenes fundamental bankruptcy law. Commencing on the filing for bankruptcy relief, a debtor cannot generally make payments of the kind sought by the FCC absent confirmation of a chapter 11 plan of reorganization. See Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987); see also In re Revere Copper & Brass, Inc., 32 B.R. 577, 582 (Bankr. S.D.N.Y. 1983) ("[p]re-petition creditors may be paid or recover on their claims in a Chapter 11 case only by means of a distribution under a confirmed plan of reorganization"). To avoid such a result, this Court should grant NextWave's petition and reverse the Second Circuit's decision.

C. The FCC's Cancellation of the Licenses Does Not Fall Within Section 362(b)(4)'s Governmental Exception.

When Congress enacted the Bankruptcy Code in 1978, it created special exceptions to the automatic stay to permit certain parties to take certain actions in specified situations. Those exceptions are clear and narrowly defined. See 11 U.S.C. § 362(b). Since 1978, Congress has added several more exceptions that it deemed were necessary in order to effectuate other laws, such as chemical weapons legislation. See 11 U.S.C.

§ 362(b)(4).[5] Similarly, the Secretaries of the Departments of Transportation, Education and Housing and Urban Development each have specially carved exceptions to the automatic stay to promote particularly important governmental interests. See 11 U.S.C. § 362(b)(8), (12) and (16). Notwithstanding the FCC's repeated emphasis on the importance of its policies and regulations, Congress has never granted the FCC any such exception.

Congress enacted the section 362(b)(4) exception for "police and regulatory power" to enforce laws affecting health, welfare, morals and safety; however, neither its text nor legislative history suggests that it should encompass "regulatory laws" that "directly conflict with the administration of the res or property by the bankruptcy court." In re State of Missouri, 647 F.2d 768, 776 (8th Cir. 1981) (holding that although laws regarding operation and liquidation of grain warehouses were regulatory in nature, they primarily related to the protection of a pecuniary interest, and as such, did not fall within the section 362(b)(4) exception), cert. denied, 454 U.S. 1162 (1982). The legislative history accompanying this provision makes this clear:

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to

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[5] Following the 1998 amendment to section 362(b)(4), reliance on its plain meaning would preclude its application to the FCC's actions with respect to the Licenses and confine its application to enforcement of chemical weapons non-proliferation legislation. See, e.g., Finley v. Miss. Dep't of Public Safety (In re Finley), 237 B.R. 890, 894-95 (Bankr. N.D. Miss. 1999) limiting application section 362(b)(4) to chemical weapons legislation).

> protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards) (emphasis added); 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) (emphasis added). Representative Gilman took a similarly restrictive view of section 362(b)(4) nearly twenty years later when discussing an amendment to section 362(b)(4):

> [W]e view it as important for the legislative history to emphasize that the new [section 362(b)(4)] relates only to the enforcement of police and regulatory power - a term which cannot appropriately be given an expansive construction for purposes of interpreting the new Bankruptcy Code language.

143 Cong. Rec. H10950-03, H10951 (daily ed. Nov. 12, 1997) (statement of Representative Gilman referring to the amendment of section 362(b)(4) adopted to accommodate chemical weapons legislation); 144 Cong. Rec. H4283-01, H4286 (daily ed. June 9, 1988) (same).[6]

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[6] Even Congressional critics of the scope of the Bankruptcy Code have recognized the limitation of this exception to the promotion or preservation of public health and safety. See 143 Cong. Rec. S9406-01 (daily ed. Sept. 16, 1997) (statement of Senator Grassley) (criticizing breadth of automatic stay, but acknowledging that only public health and safety prevail in the section 362(b)(4) exception).

The litany of case-law that has developed regarding the section 362(b)(4) exception to the automatic stay does not lead to a different conclusion. For example, this Court has held that a governmental agency is not free to enforce an assessment of pre-bankruptcy environmental clean-up reimbursement costs because doing so conflicts with the Bankruptcy Code's carefully crafted scheme for the disposition of a debtor's property. See Ohio v. Kovacs, 469 U.S. 274, 283 n.11 (1985).[7] Similarly, one bankruptcy court has refused to apply this exception to FCC licenses similar to those held by NextWave. See In re Kansas Personal Communications Servs., Ltd, 252 B.R 179, 194 (Bankr. D. Kan. 2000) (holding that the FCC is stayed from canceling a license without first obtaining relief from the stay because public health and safety concerns were not implicated).

Furthermore, this Court has held that an administrative agency which may otherwise be entitled to commence proceedings under section 362(b)(4) of the Bankruptcy Code may not exercise any rights against property of the estate unless it obtains relief from the automatic stay in the Bankruptcy Court. See Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc. (In re MCorp Fin., Inc.), 502 U.S. 32, 41 (1991).

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[7] See also, Brock v. Morysville Body Works, Inc., 829 F.2d 383, 388-89 (3d Cir. 1987) (enforcement of Secretary of Labor's order to abate violations of OSHA standards held not barred by automatic stay); Commonwealth Oil Refining Co., Inc. v. United States Environmental Protection Agency (In re Commonwealth Oil Refining Co., Inc.), 805 F.2d 1175, 1183 (5th Cir. 1986) (automatic stay held not to apply to EPA's action to bring debtor into compliance with federal and state environmental laws), cert. denied, 483 U.S. 1005 (1987).

In light of the clear legislative history concerning section 362(b)(4) and the case-law interpreting it, it should be properly concluded that the "police and regulatory power" exception plainly does not permit the FCC to cancel NextWave's Licenses retroactively solely because NextWave did not make its single interest payment prior to confirmation of its chapter 11 plan. the purported termination of the Licenses served a pecuniary rather than a regulatory purpose. It is evidently clear, that when bankruptcy law is properly applied to the facts of the instant case, the FCC cannot credibly contend that its action falls within the section 362(b)(4) exception.

IV. CONCLUSION

For all of the foregoing reasons, the undersigned respectfully requests that this Court grant NextWave's petition for certiorari and grant such other and further relief as may be just and proper.

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No. 00-447

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The FCC's brief focuses in great detail on its own general regulatory authority; that focus is entirely misplaced. Although the Bankruptcy Code leaves much agency authority unaffected, Congress has authorized bankruptcy courts to apply a narrow set of restrictions on agencies' conduct that it has deemed essential to the protection of estate property and the successful implementation of plans of reorganization. The bankruptcy court in this case applied those restrictions to bar the FCC's efforts to revoke NextWave's licenses. The Second Circuit held, however, that the bankruptcy court lacks jurisdiction to enforce the Bankruptcy Code in this case on the theory that "*[e]xclusive jurisdiction* to review the FCC's regulatory action lies *in the courts of appeals*." Pet. App. 25a (emphases added).

The Second Circuit's holding is contrary to the express command of the bankruptcy jurisdictional statutes and creates a clear circuit conflict, one that has been dramatically exacerbated by the Fifth Circuit's contrary decision in *In the Matter of GWI PCS 1 Inc.*, _ F.3d __, No. 99-11294 (5th Cir. Oct. 20, 2000), *reproduced at* App., *infra*, 1a-44a. The Fifth Circuit expressly rejected the Second Circuit's analysis, concluding: "The bankruptcy court's enjoining the FCC from revoking the licenses . . . was well within its jurisdiction." App., *infra*, 29a-30a n.29.

In a last-ditch effort to obscure the existence of the square circuit conflict created by the decision below, the FCC contends that the Second Circuit based its judgment on the purportedly exclusive authority of the FCC to make licensing decisions. That argument, however, cannot be reconciled with the actual judgment below. Even a cursory reading of the decision below demonstrates that the court of appeals rejected bankruptcy and district court jurisdiction because it held that the *courts of appeals* have exclusive jurisdiction over the underly-

ing claims here—*not*, as the FCC suggests, because the *agency* enjoys unfettered discretion over licensing decisions. Indeed, the court of appeals made clear that the claims asserted by NextWave were within the power of the federal courts (although not the bankruptcy courts) to resolve.

The FCC errs in asserting that this important jurisdictional issue is unlikely to recur merely because the FCC has suspended its financing program. The bankruptcy system functions on the strength of the bankruptcy court's ability to marshal the debtor's assets and prevent creditors, including governmental agencies, from engaging in debt collection activities that diminish the debtor's value or prevent the orderly administration of the debtor's affairs. The decision below eviscerates the key jurisdictional provisions designed to provide bankruptcy courts with precisely that authority, and creates a massive loophole that will enable governmental agencies to flaunt the Code's protections with impunity. Because the Second Circuit's decision has devastating implications for the administration of bankruptcy cases generally, certiorari is warranted.

I. The Jurisdictional Issue Is Squarely Presented

Contrary to the FCC's contention, the Second Circuit expressly predicated its denial of bankruptcy jurisdiction on Congress's grant of exclusive jurisdiction to the courts of appeals to review "regulatory" actions of the FCC: "Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals." Pet. App. 25a. Indeed, the court below repeatedly emphasized this point. *See, e.g.*, Pet. App. 20a ("'jurisdiction over claims brought against the FCC in its regulatory capacity lies *exclusively in the federal courts of appeals*'") (emphasis added).[1]

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[1] *Accord* Pet. App. 22a-23a; *id.* at 25a ("'[e]xclusive jurisdiction over review of final FCC orders is vested in the Court of Ap-

That holding is entirely indefensible, and squarely conflicts with 28 U.S.C. § 1334(b) and the decisions of this and other courts. Pet. 11-19. Moreover, although the Code leaves unaffected much of an agency's regulatory powers, Congress has expressly authorized bankruptcy courts to apply a narrow set of restrictions to prevent government agencies from revoking a license, by regulation or otherwise, solely because a debtor has failed to make a payment to the particular agency during bankruptcy. Pet. 12-14, 23-25.

In response, the FCC simply pretends that the Second Circuit's jurisdictional holding does not exist.[2] Instead, the FCC urges the wholly implausible notion that the judgment below rests on the purportedly unreviewable discretion of the FCC to revoke spectrum licenses. Opp. 16-18. That assertion is unsupportable.

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peals'"); *id.* ("'[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals.'"); *id.* ("Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals"); *id.* at 25a-26a ("'[t]he court of appeals . . . has *exclusive jurisdiction* to'" review final FCC orders) (emphasis in original).

[2] The FCC has been more candid in describing the Second Circuit's holding elsewhere. Indeed, within weeks of representing to this Court that the Second Circuit's decision was *not* based on any grant of exclusive jurisdiction to other *courts* (*see* 99-1980 Opp. 14-17), the FCC took precisely the opposite position in a nearly identical bankruptcy case involving C-Block licensees. The FCC cited the Second Circuit's *NextWave* decisions for the proposition that the bankruptcy court lacked jurisdiction because "*exclusive jurisdiction for review of final FCC determinations lies in the courts of appeals*." FCC Br. in *In re Kansas Personal Commun. Servs., Ltd.*, No. 00-2392, at 18-19 (D. Kan. Oct. 11, 2000) (emphasis added) (copy lodged with the Clerk). The FCC's attempt to capitalize on the actual holding below in other litigation, while pretending in this Court that that holding does not exist, is clear proof that the judgment below will have a pernicious impact on bankruptcy-court jurisdiction absent further review.

Far from characterizing the FCC's authority as exclusive of judicial review, the court of appeals instead held that the FCC's revocation decision *was* reviewable in court, albeit not in bankruptcy court: "[T]he bankruptcy court lacks jurisdiction to decide whether the FCC's regulatory decision is a proper exercise of discretion, or to decide whether it is provident and in the public interest. *All of these decisions are within the exclusive jurisdiction of the federal courts of appeals.*" Pet. App. 22a-23a (emphasis added); *see also id.* at 19a ("It is for the FCC to state its conditions of licensure, and *for a court with power to review the FCC's decisions to say if they are arbitrary or valid.*") (emphasis added).

Indeed, the court of appeals discussed at some length the procedures for obtaining judicial review of the FCC's decisions in the courts of appeals (Pet. App. 25a-28a), and went out of its way to hold that NextWave's claims *were* reviewable in a court possessed of jurisdiction: "NextWave remains free to pursue its challenge to the FCC's regulatory acts." *Id.* at 27a; *see also id.* at 28a n.10 ("we have no doubt that the Public Notice [announcing the purported revocation and re-auction of NextWave's licenses] . . . is an appealable decision or order of the FCC" reviewable in the courts of appeals).

Thus, the FCC fails utterly in its attempt to deny the import of the court of appeals' holding. The judgment below rejects bankruptcy jurisdiction in reliance on the exclusive jurisdiction provisions of 28 U.S.C. § 2342 and 47 U.S.C. § 402, while at the same time refuting the FCC's "exclusive agency jurisdiction" theory.

II. The Judgment Below Creates An Intolerable Conflict With Decisions Of Other Courts

Given the far-reaching nature of the judgment below, the FCC's attempt to deny the existence of a circuit conflict is wholly unpersuasive. Indeed, the conflict has been dramatically exacerbated by the Fifth Circuit's decision in the *GWI* case, which reaches precisely the op-

posite conclusion on the identical jurisdictional issue. *See* 99-1980 Reh'g Pet. 3-6. The Fifth Circuit expressly held that "[t]he bankruptcy court's enjoining the FCC from revoking the licenses . . . *was within its jurisdiction to preserve property of the estate* . . . and further the reorganization plan." App., *infra*, 28a n.29 (emphasis added). The *GWI* court expressly predicated the existence of bankruptcy jurisdiction on 28 U.S.C. §§ 157 and 1334(b), explaining that § 1334(b) confers bankruptcy jurisdiction "'*[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.*'" App., *infra*, 28a n.29 (emphasis added). The Fifth Circuit also relied on 11 U.S.C. § 106, which expressly subjects the FCC and other federal agencies to bankruptcy proceedings of the type at issue here. App., *infra*, 28a-29a n.29.

The FCC errs in asserting that the *GWI* court "specifically avoided deciding" the jurisdictional question by resorting to the doctrine of equitable mootness. The Fifth Circuit correctly treated the issue of jurisdiction as a threshold question, and resolved that question as an *express prerequisite* to its consideration of the equitable mootness doctrine. App., *infra*, 29a-30a & n.29; *see Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 384 (1884) ("the judicial power of the United States must not be exerted in a case to which it does not extend"); *In re Vineyard Bay Dev. Co.*, 132 F.3d 269, 271 (5th Cir. 1998) ("this equitable mootness doctrine is prudential rather than jurisdictional"). The Fifth Circuit directly confronted the question of subject matter jurisdiction, and held, contrary to the judgment below, that "[t]he bankruptcy court's enjoining the FCC from revoking the licenses . . . *was within its jurisdiction.*" App., *infra*, 28a n.29 (emphasis added).[3]

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[3] The FCC's contention (Opp. 29) that the Fifth Circuit left open the question whether it would have "reverse[d] the bankruptcy court's avoidance judgment" if the FCC's arguments were not eq-

The FCC's principal ground for distinguishing the other court of appeals cases identified in the petition—that they "all deal with court, not agency, jurisdiction" (Opp. 18)—is wholly unpersuasive. As demonstrated in Point I, *supra*, the judgment below "deal[s] with court . . . jurisdiction" as well, and in fact rests entirely on the purportedly exclusive nature of the jurisdiction granted to the courts of appeals. Thus, the cases cited in the petition are squarely on point, and this Court's review is necessary to correct this widening circuit split.

The *GWI* decision also exacerbates a related conflict identified in the petition. The *GWI* court supported its jurisdictional holding in part by determining that "[t]he bankruptcy court's enjoining the FCC from revoking the licenses . . . was within its *jurisdiction to preserve property of the estate*." App., *infra*, 28a n.29 (emphasis added). Thus, like the cases cited in the petition (Pet. 14), *GWI* holds that FCC licenses are "property of the estate" and that bankruptcy courts have jurisdiction to preserve such property from attempts by creditors—including agencies—to seize them. 28 U.S.C. § 1334(e) (granting bankruptcy courts "*exclusive jurisdiction* of all . . . *property of the estate*") (emphases added); *cf. Cleveland v. United States*, No. 99-804 (Nov. 7, 2000), slip op. 13 n.4. By rejecting bankruptcy jurisdiction in this case, the Second Circuit necessarily held that FCC licenses are not "property of the estate" and therefore fall outside the scope of this jurisdictional grant.[4]

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uitably moot is irrelevant. App., *infra*, 31a n.31. The jurisdictional issue both precedes and is distinct from the merits of the avoidance claim, which is not even at issue in this case.

[4] The FCC erroneously asserts that the Fifth Circuit's "property of the estate" holding is "ambiguous." Opp. 23 n.14. The Fifth Circuit plainly concluded that the licenses were property of the estate: "The bankruptcy court's enjoining the FCC from revoking the licenses *and* avoiding the majority of the obligations under the

The FCC also argues, somewhat bizarrely, that even if spectrum licenses are property of the estate, they lack that status "*vis-a-vis* the FCC's exercise of regulatory authority." Opp. 21-23. Not surprisingly, the FCC cites no authority for such a shifting definition of property of the estate. Equally without merit is the FCC's contention that "petitioner lost any proprietary interest in its licenses when they automatically lapsed following petitioner's failure to meet the timely payment requirement." Opp. 23. It is undisputed that when NextWave sought bankruptcy protection, it was in *full* compliance with *every* requirement imposed by the FCC, including all payment obligations. Once in bankruptcy, NextWave was prohibited from making payments to any of its creditors by operation of its bankruptcy and was entitled to all of the protections of the Bankruptcy Code, including the automatic stay, the right to cure defaults, the prohibition against revocation of licenses for nonpayment of dischargeable debts, and the other provisions relied upon by the bankruptcy court in its decision below. *See* Pet. 8-10, 13; Pet. App. 49a-82a. As the bankruptcy court found—in the only ruling to date on the merits of these issues—those provisions barred the FCC from revoking NextWave's licenses, and thus prevented NextWave from "los[ing] any proprietary interest in its licenses." Opp. 23.

The FCC's arguments that it is immune from the various statutory protections relied upon by NextWave and the bankruptcy court (Opp. 24-28) is irrelevant, since the judgment below rests on jurisdictional grounds and does not resolve NextWave's claims on the merits. Pet. App. 24a. The Code provisions cited by NextWave are significant because they conclusively demonstrate Congress's intent that bankruptcy courts possess juris-

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notes was within its jurisdiction to preserve property of the estate." App., *infra*, 28a n.29 (emphasis added).

diction to protect and preserve property of the estate against the very types of actions at issue here—even when those actions are taken by federal agencies seeking to hide behind the "regulatory" nature of their decisions. *See* Pet. 12-14, 23-24.[5]

III. The Alternative Ground Proffered By The FCC Is Without Merit

The FCC's "agency jurisdiction" theory is wrong as a matter of law. The principal authority cited by the FCC in support of this argument—other than its detailed but irrelevant exposition of the regulatory scheme—is *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991). *MCorp* involved a debtor's attempt to invoke bankruptcy jurisdiction to enjoin ongoing administrative enforcement proceedings pending before the Federal Reserve Board. This Court held that the district court lacked jurisdiction to grant such relief, relying on 12 U.S.C. § 1818(i)(1), which stated that "'no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order.'" 502 U.S. at 39, 44 (citation omitted). Thus, *MCorp* held only that Section 1334(b) "d[oes] not authorize an injunction against a regulatory proceeding"

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[5] In any event, the FCC's merit arguments are incorrect. For example, the FCC contends (Opp. 25-27) that § 525(a) applies *only* in cases of "discrimination," simply ignoring the fact that the statute separately prohibits *both* "discriminat[ion]" with respect to license grants *and* "revok[ing] . . . a license" for non-payment of a dischargeable debt. 11 U.S.C. § 525(a). The FCC also incorrectly argues that debts owed to the FCC are not "dischargeable" because the FCC's payment requirements have a "regulatory" purpose. All license revocation decisions are by definition "regulatory" in nature, yet § 525(a) precludes *all* such revocations where, as here, they are triggered by non-payment of a financial debt that is not statutorily exempt from discharge. The FCC's arguments regarding the automatic stay are equally meritless. *See* Br. of Prof. Klee as *Amicus Curiae* at 13-17.

where there was "'specific preclusive language'" in another statute denying *any* court jurisdiction over the agency's actions. *Celotex Corp. v. Edwards*, 514 U.S. 300, 311 (1995).

In this case, by contrast, there is no "specific preclusive language" forbidding judicial review of FCC actions. The FCC's suggestion (Opp. 17) that the FCC's licensing decisions are immune from judicial review is simply incorrect, and conflicts with other circuit court decisions. *See, e.g., Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (overturning FCC's denial of licensee's renewal application); *Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997) (reversing FCC's licensing decision and ordering company's reinstatement as interim licensee); *Satellite Broad. Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) (vacating FCC order dismissing license applications). Thus, *MCorp* is of no assistance to the FCC.[6]

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[6] The FCC argues in the alternative that the bankruptcy court lacked jurisdiction because "any authority granted bankruptcy courts by Section 1334(b) is 'concurrent' with the otherwise exclusive jurisdiction accorded to other courts," and that the D.C. Circuit dismissed a petition for review challenging the cancellation of NextWave's licenses on the ground that a petition for reconsideration was then pending in the FCC. Opp. 17 n.9. Respondent's "concurrent jurisdiction" argument is frivolous. Nothing in the Bankruptcy Code makes bankruptcy jurisdiction derivative of other jurisdictional provisions. To the contrary, § 1334(b) merely provides that bankruptcy-court jurisdiction over civil proceedings arising under or related to cases under the Bankruptcy Code is "not exclusive." Bankruptcy jurisdiction is both independent of and different in scope than the jurisdiction to review agency actions conferred by 47 U.S.C. § 402 and 28 U.S.C. § 2342. *See, e.g., In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1154-55 (9th Cir. 1992) (exhaustion of administrative remedies not a prerequisite to bankruptcy jurisdiction). In any event, no proceeding was pending before the FCC when the bankruptcy court declared the FCC's license cancellation null and void.

Also contrary to the FCC's assertions, the bankruptcy court did not "arrogate to itself the FCC's exclusive administrative authority to issue spectrum licenses." Opp. 17. The FCC, not the bankruptcy court, granted the licenses to NextWave. Pet. App. 106a. The bankruptcy court merely exercised its authority under 11 U.S.C. §§ 106, 362, 525(a), and 1123 to protect the property of the bankruptcy estate to allow implementation of NextWave's plan of reorganization.

The FCC's argument that even that limited exercise of bankruptcy jurisdiction is precluded by the FCC's all-important "regulatory" role is nothing other than an attempt to exempt the FCC from the requirements of the Bankruptcy Code and to seize property of the estate, thereby placing the FCC in a superior position to other creditors in the satisfaction of its financial claims. The FCC has taken action to seize the main asset of the estate and retain the $500 million in license payments previously paid to it by NextWave, thereby destroying the opportunity for the other creditors to obtain full recovery under NextWave's pending plan of reorganization. Congress has expressly authorized bankruptcy courts with the power to prevent such conduct by regulatory agencies. The Fifth Circuit and other courts of appeals have recognized this authority. The Second Circuit has applied a directly contrary holding that will have devastating implications on the administration of bankruptcy cases involving regulatory agencies.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted. In the event the Court is inclined to grant the petition in No. 99-1980, the Court may wish to grant and consolidate both cases or hold this petition pending disposition of that case.

Respectfully submitted.

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November 8, 2000

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11294

IN THE MATTER OF: GWI PCS 1 INC;
GWI PCS 2 INC; GWI PCS 3 INC;
GWI PCS 4 INC; GWI PCS 5 INC;
GWI PCS 6 INC; GWI PCS 7 INC;
GWI PCS 8 INC; GWI PCS 9 INC;
GWI PCS 10 INC; GWI PCS 11 INC;
GWI PCS 12 INC; GWI PCS 13 INC;
GWI PCS 14 INC; GENERAL
WIRELESS INC; GWI PCS INC,

Debtors,

versus

UNITED STATES OF AMERICA, on behalf of
FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

versus

IN THE MATTER OF: GWI PCS 1 INC;
GWI PCS 2 INC; GWI PCS 3 INC;
GWI PCS 4 INC; GWI PCS 5 INC;
GWI PCS 6 INC; GWI PCS 7 INC;
GWI PCS 8 INC; GWI PCS 9 INC;
GWI PCS 10 INC; GWI PCS 11 INC;
GWI PCS 12 INC; GWI PCS 13 INC;
GWI PCS 14 INC; GENERAL
WIRELESS INC; GWI PCS INC,

Appellees.

Appeal from the United States District Court
for the Northern District of Texas

October 20, 2000

Before GARWOOD, WIENER, and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

The Federal Communications Commission (FCC), on behalf of the United States, appeals from the district court's judgment affirming a bankruptcy reorganization plan for debtors General Wireless, Inc. (GWI), GWI PCS, Inc. (GWI PCS), and GWI PCS 1, GWI PCS 2, GWI PCS 3, GWI PCS 4, GWI PCS 5, GWI PCS 6, GWI PCS 7, GWI PCS 8, GWI PCS 9, GWI PCS 10, GWI PCS 11, GWI PCS 12, GWI PCS 13, GWI PCS 14 (the subsidiary debtors), (collectively, the Debtors). The reorganization plan included an order that the subsidiary debtor's and GWI PCS's obligation to pay $954 million to the FCC, evidenced by promissory notes signed by the subsidiary debtors, as part of GWI PCS's winning bids for fourteen radio-spectrum licenses at an FCC auction, was a constructive fraudulent transfer under 11 U.S.C. § 548. The bankruptcy court therefore avoided approximately $894 million of the $954 obligation to the FCC and allowed the subsidiary debtors to retain the licenses. The FCC now appeals the avoidance judgment, arguing that its appeal of the avoidance judgment is not equitably moot and that the bankruptcy court improperly assumed the FCC's regulatory authority and erred in avoiding $894 million of the obligation to the FCC. We affirm.

Facts and Proceedings Below

In 1993, Congress passed several amendments to the Federal Communications Act (FCA), including section 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j) authorized the FCC to sell electromagnetic licenses for personal communications services (PCS) to private companies by auction. Section 309(j) also required the FCC to design auctions that "ensure that small businesses, rural telephone

companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D); *see* 47 U.S.C. § 309(j)(3)(B). To further this directive, the FCC reserved the C and F-blocks of the electromagnetic spectrum[1] for auction to small, entrepreneurial companies referred to as "designated entities." *See* 47 C.F.R. § 24.709 (1995).

The C-block auction began in December 1995 and ended on May 6, 1996. On December 18, 1995, GWI made the initial payment of approximately $53 million to qualify GWI PCS, a subsidiary of GWI, to bid at the C-block auction.[2] At the conclusion of the C-block auction, GWI PCS was the high bidder for fourteen PCS licenses, covering areas in Southern Florida, Northern California, and Atlanta, Georgia. *See In re Applications of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 2, 1997 WL 159931 (Jan. 27, 1997). GWI PCS's winning bids were

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[1] The megahertz of radio frequency determines the carrying capacity of a block of wireless spectrum, and the FCC had divided the electromagnetic spectrum allocated to PCS licenses into "blocks" designated as the A, B, C, D, E, and F-blocks. The A, B, and C-blocks consist of 30 megahertz of spectrum, while the D, E, and F-blocks of 10. Another measurement, a "pop", represents 1000 persons within the geographic area covered by a particular licensing block. Dollars per megahertz-pop, a generally accepted industry measurement standard, represents the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

[2] As part of the FCC's C-block auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. *See* 47 C.F.R. § 24.711(a)(1) (1995) ("Each eligible bidder for licenses on frequency Block C subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.").

each approximately five percent higher than the next-highest bid and totaled approximately $1.06 billion.[3] On May 22, 1996, GWI PCS filed license application forms for the fourteen licenses. *See* 47 C.F.R. § 24.707 (1995).[4] On May 31, 1996, the FCC released a public notice accepting GWI PCS's applications for the licenses and setting July 1, 1996 as the cut-off date for parties in interest to file objections, pursuant to 47 C.F.R. § 24.830 (1995), to GWI PCS receiving the licenses. *See In re Applications of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 2, 1997 WL 159931 (Jan. 27, 1997). Two parties did object, contending that GWI PCS had violated the foreign ownership restrictions, *see* 47 U.S.C. § 310(b), 47 C.F.R. § 24.804(b) (1995), and the rules against collusive bidding, *see* 47 C.F.R. § 1.2105(c) (1995).[5] *See In re Applications of GWI PCS, Inc.*, 12 F.C.C.R. 6441 ¶ 4, 1997 WL 159931 (Jan. 27,

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[3] The C-block auction resulted in the awarding of 493 C-block licenses to approximately 90 designated entities for a total bid amount of approximately $10.2 billion.

[4] 47 C.F.R. § 24.707 states as follows:

"Each winning bidder will be required to submit a long-form application on FCC Form 600, as modified, within ten (10) business days after being notified that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in Subpart I of this Part and § 1.2107 (c) and (d) of this Chapter and any associated Public Notices. Only auction winners (and applicants seeking partitioned licenses pursuant to agreements with auction winners under § 24.714) will be eligible to file applications on FCC Form 600 for initial broadband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 600."

[5] 47 C.F.R. § 24.701 provides that the competitive bidding procedures for broadband PCS incorporate "[t]he general competitive bidding procedures found in 47 CFR Part 1, Subpart Q . . . unless otherwise provided in [47 C.F.R. Part 24, Subpart H]."

1997). After investigating the bases for the objections, the FCC concluded that GWI PCS did not exceed the foreign ownership limitations and that there was insufficient evidence to find that GWI PCS had violated the FCC's rules prohibiting collusion in the bidding process. *See id.* ¶ 5.

On January 27, 1997, the FCC approved the granting of the fourteen licenses for which GWI PCS was the high bidder. *See Wireless Telecommunications Bureau Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block Licenses to GWI PCS Inc.*, 12 F.C.C.R. 1215, 1997 WL 28957 (Jan. 27, 1997). At GWI's request, each license was conditionally transferred to one of the fourteen subsidiary debtors.[6] *See id.* at n.1. On February 3, 1997, GWI paid the second half of the down-payment, $53 million, for the licenses on behalf of the subsidiary debtors. On March 10, 1997, the fourteen subsidiary debtors executed notes to the FCC for amounts totaling approximately $954 million-the sum of the winning bids for the fourteen licenses less the ten percent in down-payments made by GWI. The notes were sent to the FCC by Federal Express on March 13, 1997 and were received by the FCC on March 14, 1997.

In early 1997, a significant number of C-block licensees, experiencing difficulties in securing financing

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[6] Pursuant to the FCC regulations issued under 47 U.S.C. § 309(j), winning bidders that were "small businesses" were required to pay only 10 percent of their winning bids in cash; the remaining 90 percent could be paid in installments over a ten-year period at below market interest rates. *See* 47 C.F.R. §§ 1.2110(e), 24.711(b) (1995). The transfer of the licenses remained contingent on the subsidiary debtors signing the notes and the depositing of the remaining 5 percent of the down-payment; however, upon the execution of the notes on March 10, 1997, the licenses became effective as of January 27, 1997.

and facing the prospect of early default on their installment payments to the FCC, petitioned the FCC for relief from their licenses' installment payments.[7] In February 1997, the FCC suspended the C-block installment payments and commenced rule-making proceedings to address the problems faced by C-block licensees. Following six months of administrative proceedings, the FCC issued an order on October 16, 1997, the Restructuring Order, that provided C-block licensees with several options to ease their financial difficulties, including allowing a licensee to return all or portions of a license to the FCC in exchange for significant debt reduction. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 12 F.C.C.R. 16436, 1997 WL 643811 (Sept.

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[7] These difficulties were generally limited to the winning bidders at the C-block auction, because the winning bids at the A, B, D, E, and F-block auctions were considerably lower than the winning bids at the C-block auction when measured in dollars per megahertz-pop, *see supra* note 1. The average winning bid at the A and B-block auctions held in March 1995 was $.50 per megahertz-pop. At the D, E, and F-block auctions concluded in January 1997, the average winning bid for the D and E-blocks, in cash, was approximately $.35 per megahertz-pop, and for the F-blocks, which like the C-block auction was reserved for qualified entities and thus subject to favorable ten-year financing, was $.25 per megahertz-pop. In contrast, the average winning bid at the C-block auction in May 1996 was considerably higher per megahertz-pop. One of the reasons proffered for the steep decline in the value of C-block licenses after the May 1996 auction was the FCC's decision to auction the D, E, and F-blocks after the C-block auction was concluded but before the C-block licenses were to be issued, thereby greatly increasing the volume of licenses soon to be available for purchase at auction. For a general survey of the difficulties facing C-block licensees, see Carolyn Hochstadter Dicker, *PCS Licenses and the "Specter" of Bankruptcy*, 6 COMMLAW CONSPECTUS 59 (1998).

25, 1997). The FCC, however, expressly rejected proposals that would have allowed licensees to retain their licenses without paying their winning bids in full, because, in the FCC's view, the C-block auction had been designed to ensure that the licenses were to be allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *See id.* ¶ 5. In response to numerous requests for reconsideration of the Restructuring Order, the FCC altered the Restructuring Order slightly in March 1998 to allow licensees greater flexibility in making their decisions regarding the options provided in the Restructuring Order; however, the basic framework of the Restructuring Order was retained. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 13 F.C.C.R. 8345, 1998 WL 130176 (Mar. 23, 1998).

The subsidiary debtors did not elect to pursue one of the options for relief presented by the FCC in the Restructuring Order. Instead, on October 20, 1997, the subsidiary debtors filed voluntary bankruptcy petitions under chapter 11 in the Northern District of Texas. On October 29, 1997, the subsidiary debtors initiated an adversary proceeding against the FCC, in part to avoid their payment obligations under the promissory notes executed in March 1997 on the basis that those obligations constituted constructive fraudulent transfers for which the subsidiary debtors had received less than reasonably equivalent value, *i.e.*, the licenses were worth less than the notes, and had become insolvent as a result. On January 26, 1998, GWI and GWI PCS also filed for bankruptcy protection, and their chapter 11 cases were consolidated with those of the fourteen subsidiary debtors. In an amended complaint, GWI and GWI PCS joined the adversary proceeding against the FCC, seeking to avoid any obligation that they may have incurred to pay the balance of the bid price to the FCC. The FCC defended against the Debtors' attempt to avoid the obligations by arguing, *inter alia*, that the value of

the licenses received by the Debtors should be measured as of the date the C-block auction closed, May 8, 1996, and that the sixteen GWI entities should be collapsed and treated as a single entity. In addition, the FCC maintained that, if the bankruptcy court allowed the subsidiary debtors to retain the licenses without paying the bid price, the FCC's regulatory authority will be effectively usurped through the bankruptcy proceeding and the terms of license ownership as set forth in FCC regulations will be improperly altered through bankruptcy.

After conducting a trial on the adversary proceeding from April 13, 1998 through April 17, 1998, the bankruptcy court in a bench ruling on April 24, 1998 granted the relief sought by the Debtors. The bankruptcy court found that, although the value of the fourteen C-block licenses on the date the auction closed, May 8, 1996, was $1.06 billion, the licenses' value had declined to $166 million by January 27, 1997,[8] the date the FCC conditionally granted the licenses to the subsidiary debtors who then became obligated to pay the remaining balance of GWI PCS's bids.[9] In addition, the bankruptcy court found that when the subsidiary debtors executed the notes, they held assets totaling $2 million plus the fourteen licenses valued at $166 million with

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[8] The bankruptcy court found that the licenses dropped in value to between $132 million and $200 million and appears to have simply split the difference in arriving at the $166 million figure.

[9] The bankruptcy court also determined that the value of the licenses did not change between January 27, 1997 and March 14, 1997; and that therefore, whether the transfer of the licenses from the FCC to the subsidiary became effective on January 27, 1997-the date the licenses were awarded-or on March 14, 1997-the date the notes securing the obligation to pay the remaining $954 million were received by the FCC-was of no moment to the value of the licenses for purposes of avoidance.

debts, represented by the notes, of approximately $954 million, thereby rendering the subsidiary debtors insolvent. The bankruptcy court also ruled that the GWI corporations were all separate legal entities, declining to treat them as one under the FCC's alter ego theory,[10] and refused to set the date the auction closed, May 8, 1996, as the date to evaluate the transfer of the licenses, because the bankruptcy court reasoned that it was not until January 27, 1997 that the licenses were issued by

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[10] With regard to this conclusion, the bankruptcy court stated as follows in its oral ruling:

> "The separate corporations, all being separate legal entities, shall not be considered the alter ego of the parent debtor. The debtors perpetuated no sham or fraudulent transaction on the government. Indeed, the debtors acted in good faith, following all FCC regulations and rules. The government has not established the applicability of any common law alter ego theory.
>
> The government contends, however, that federal case law recognizes situations when corporate form should be ignored, if necessary, to preserve or protect some public policy.
>
> . . .
>
> As the Court has found, there is no evidence of a fraud or that the corporate structure was used as a sham. GWI had legitimate business purposes for the use of the corporate form, which the FCC recognized as common and approved. The subsidiaries were not created to be a conduit or agent . . ., but to be operating entities in their respective areas of the country. This Court should, therefore, honor the separate corporate entities."

Before the bankruptcy court, the FCC sought to hold GWI responsible for the notes and bids under an alter ego theory. As GWI did not participate in the actual bidding at the C-block auction and did not sign any promissory notes, in the absence of alter ego, GWI incurred no obligation towards the unpaid balance of the bid price. The FCC did not appeal the foregoing finding to the district court and does not raise it before this Court.

the FCC and the transfer completed. Thus, January 27, 1997 became the date for determining avoidability of the notes. The bankruptcy court therefore ruled that the obligation incurred to the FCC above the actual value of the licenses on January 27, 1997, or $894 million, was a constructive fraudulent transfer, avoidable under 11 U.S.C. § 548.[11] The bankruptcy court similarly avoided

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[11] 11 U.S.C. § 548, prior to being amended in 1998, stated as follows:

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date

[Footnote continued on next page]

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such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section-

(A) 'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101(34), 741(5), or 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

[Footnote continued on next page]

GWI PCS's obligation to the FCC, reasoning that GWI PCS did not incur any obligation to pay the remainder of the $1.06 billion auction price for the licenses until the remaining five percent down-payment was made, the formal application for the licenses was submitted, and the licenses were obtained after the FCC's regulatory process and review. Therefore, the bankruptcy court concluded that GWI PCS's obligation to pay the remainder of the bid price was not incurred until January 27, 1997. The bankruptcy court also rejected the FCC's argument that non-payment of the entire obligation resulted in cancellation of the licenses. On June 4, 1998, the bankruptcy court entered judgment on the avoidance claim,[12] reducing the remaining payment obligations for

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[Footnote continued from previous page]

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer."

11 U.S.C. § 548 (1996).

[12] In its final judgment on the avoidance claims, the bankruptcy court ordered, in relevant part, that:

"1. the obligations that GWI PCS, Inc. ("PCS") incurred to the United States, acting through the Federal Communications Commission ("FCC"), on May 8, 1996 are not avoided because as of that date, PCS received reasonably equivalent value in exchange for those obligations;

2. the obligations that GWI PCS 1, Inc., GWI PCS 2, Inc., GWI PCS 3, Inc., GWI PCS 4, Inc., GWI PCS 5, Inc., GWI PCS 6, Inc., GWI PCS 7, Inc., GWI PCS 8, Inc., GWI PCS 9, Inc., GWI PCS 10, Inc., GWI PCS 11, Inc., GWI PCS 12, Inc., GWI PCS 13, Inc., and GWI PCS 14, Inc. (the "Subsidiary Debtors") and PCS incurred to the United States, acting through the FCC, on January 27, 1997 are avoided pursuant to 11 U.S.C. § 548(a)(2)(A) and (B)(i) & (ii), because the Subsidiary Debtors and PCS did not receive reasonably equivalent value in exchange for these obligations, and on this date, the Subsidiary Debtors

[Footnote continued on next page]

the fourteen licenses from approximately $954 million to $60 million,[13] which amount is secured by the licenses.[14] The FCC then appealed the avoidance order to the district court, maintaining that the Debtors remained obligated for the full face value of the notes and that the bankruptcy court erred in avoiding approximately $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC.[15]

[Footnote continued from previous page]

and PCS were or became insolvent and were undercapitalized for the contemplated business activity they intended to pursue;

3. pursuant to 11 U.S.C. § 548(c), the obligations of PCS and the Subsidiary Debtors to the United States are reduced to a $60 million, which amount is the difference between the value of the obligations as of January 27, 1997 -- $166 million -- and the $106 million already paid on the obligations, and which amount is secured by the licenses issued by the FCC to the Subsidiary Debtors."

[13] The $60 million figure represents the value of the licenses on January 27, 1997, $166 million, less the two $53 million down-payments made by GWI.

[14] As an alternative remedy to avoidance, the Debtors moved the bankruptcy court to rescind the notes. Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows a debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that bargain. The bankruptcy court declined to order a rescission of the notes, *see* 11 U.S.C. §§ 105 & 550, as it would have required a reauction of the fourteen licenses, resulting in further delay in the development of licenses by small business, in contravention to Congress's mandate in § 309(j) of the FCA.

[15] On appeal to the district court, the FCC presented four arguments: (1) the subsidiary debtors and GWI PCS had incurred a binding obligation to pay the bid price for the licenses on May 8, 1996, the date the auction closed; (2) permitting the subsidiary debtors to retain the licenses without complying fully with the

[Footnote continued on next page]

Over the FCC's objection, the bankruptcy court proceeded to confirm a plan of reorganization, which incorporated its prior ruling that avoided $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC and enjoined the FCC from taking any action to revoke the fourteen licenses.[16] The reorganization plan contained two possible outcomes of the reorganization effort. The first option, labeled the "Business Alternative," provided for the Debtors raising money in the financial markets and continuing with their original plan to offer wireless communications services. In the event the Business Alternative failed, the plan also provided for a "Litigation Alternative," under which the Debtors would return the fourteen licenses to the FCC and pursue litigation against the FCC to recover the $106 million down-payment for the licenses, which would then be distributed among the Debtors' creditors. On September 10, 1998, the bankruptcy court, pursuant to 11 U.S.C. § 1129, entered an order confirming the plan of reorganization. Under the reorganization plan, the subsidiary debtors and GWI PCS were obligated to pay the FCC $60 million at a six-and-one-half per cent

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terms of the bid would unlawfully alter the terms for C-block license ownership established by FCC regulations; (3) the bankruptcy court erred in extinguishing, rather than subordinating, the FCC's claim in excess of $166 million; and (4) the bankruptcy court erred in its valuation of the licenses on January 27, 1997 at $166 million. Notably, the FCC did not appeal the bankruptcy court's determination that the debtor entities should not be collapsed or treated as one entity under an alter ego theory.

[16] The confirmation order, in relevant part, states as follows:

"[It is further] ORDERED that on and after the Effective Date, the FCC shall be and hereby is enjoined from taking any action whatsoever against the Debtors to revoke their PCS licenses in connection with any claim, transaction or occurrence which arose prior to the Effective Date . . . ."

rate of interest; this $60 million obligation was secured by the licenses. The bankruptcy court also modified the reorganization plan to preserve certain issues raised in the appeal of the avoidance judgment.[17] In short, if a reviewing court did not affirm the avoidance judgment and determined that the bankruptcy court's valuation of the licenses was incorrect, the FCC would receive an increased secured claim equal to the lesser of (1) the amount determined by final judgment, or (2) the average price produced at the FCC's reauction of C-block licenses scheduled for March 1999.[18] If the amount of

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[17] In the confirmation order, the bankruptcy court provided that:

"[It is further] ORDERED that in the event the Avoidance Judgment is not finally affirmed on appeal, and the appellate process results in a judgment producing a claim for the FCC in an amount in excess of $60 million, the FCC's secured claim, for purposes of the Plan and treatment thereunder, shall be increased from $60 million to the lesser of (i) the amount of the claim produced by the final judgment or (ii) the amount of the claim produced by the average price per pop bought at the FCC re-auction of C Block licenses in March 1999 multiplied by the number of the pops covered by the Debtors' licenses; and it is further

[] ORDERED that if the amount of the FCC's claim as determined on appeal is greater than the value established at the reauction, the FCC shall have an unsecured claim against the Debtors for the difference between the amount determined by the reauction and the amount determined on appeal, payable on a pro rata basis from the Unsecured Creditors' Fund with all other Unsecured Claims."

The reorganization plan did not provide for an unsecured claim for the FCC, but did establish a creditors' fund of $18 million for the payment of all unsecured claims in the event that the avoidance judgment was reversed or modified on appeal, thus keeping available funds if the FCC became entitled to an unsecured claim.

[18] The reauction began on March 23, 1999 and concluded on April 20, 1999. The average bid price per pop of a C-block license

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the FCC's claim determined on appeal was greater than the price at the reauction, the FCC's claim would be bifurcated under 11 U.S.C. §§ 502 & 506, with the FCC receiving an additional unsecured claim for the difference between the amount determined at the reauction and the amount determined on appeal, payable out of the creditors' fund (*see* note 17, *supra*) on a pro rata basis with other unsecured creditors. In preserving the FCC's appellate rights, the bankruptcy court sought to provide a fair and equitable means for the FCC to protect its interest in the licenses without unduly hindering the Business Alternative and the Debtors' ability to finance and implement the reorganization plan.

The FCC appealed the confirmation order to the district court. The district court, having appellate jurisdiction under 28 U.S.C. § 158(a),[19] consolidated the

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bought at the reauction was $3.88. As the subsidiary debtors' 14 licenses cover approximately 17.9 million pops, the amount of the claim produced by the average price per pop bought at the FCC reauction of the C-block licenses multiplied by the number of the pops covered by the subsidiary debtors' licenses would total approximately $69,452,000.

[19] 28 U.S.C. § 158(a) provides as follows:

"(a) The district courts of the United States shall have jurisdiction to hear appeals[]

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

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FCC's appeal of the confirmation order and its appeal of the avoidance judgment. The FCC also sought a stay of both the adversary judgment and the confirmation order of the bankruptcy court. The district court entered a temporary stay on September 10, 1998, which expired by its terms on September 30, 1998. On September 30, 1998, the then-Chief Judge of this Court issued a stay "to preserve the status quo and jurisdiction until . . . this court ha[s] an appropriate opportunity to determine whether to stay the Avoidance Decision and the Confirmation Decision until appeals therefrom are finally resolved." *In re United States*, No. 98-11123 (5th Cir. Sept. 30, 1998) (unpublished). This stay was lifted by this Court on October 7, 1998. *In re United States*, No. 98-11123 (5th Cir. Oct. 7, 1998) (*per curiam*) (unpublished). No further stay was secured by the FCC.

While the FCC's consolidated appeals remained pending in the district court, the Debtors proceeded, in the absence of a stay, to perform some of the transactions set forth in the Business Alternative. On October 29, 1998, the Debtors moved to dismiss the entirety of the FCC's appeal of the confirmation order and partially dismiss the FCC's appeal of the avoidance judgment, because the reorganization plan had been substantially consummated.[20] The FCC opposed the

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An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving."

[20] The Debtors listed the following financial transaction as having been conducted: (1) equity investors having provided approximately $5.1 million in funding to the Debtors; (2) equity investors having signed notes with a face value of approximately $5.1 million payable to the Debtors and the Debtors having drawn upon $4.4 million of these funds; (3) Lucent Technologies having funded $30 million to the Debtors; (4) a $28 million payment by the Debtors to Hyundai Electronics of America; (5) the Debtors'

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motion to dismiss its appeal, and when the district court had not ruled on the FCC's appeals nearly ten months later, the Debtors sought a writ of mandamus from this Court directing the district court to issue a decision. The mandamus petition was denied when the district court indicated that it would rule by September 30, 1999. *In re GWI PCS 1, Inc.*, No. 99-10923 (5th Cir. Aug. 25, 1999) (unpublished).

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funding their contemplated professional fees; (6) the retention of Prudential Securities, Inc., as a financial advisor and lead manager of the Debtors' high yield debt offering, including a $150,000 non-refundable retainer paid to Prudential; (7) paying an initial distribution to unsecured creditors holding allowed claims; (8) paying the majority of the Debtors' remaining administrative expenses; (9) the Debtors' issuing $5 million in preferred stock; (10) the subsidiary debtors signing new notes and security agreements in favor of the FCC; (11) the Debtors' payment to the FCC of the first installment on the licenses, approximately $2 million; (12) payment of the Debtors' regular operating expenses, including payroll, payroll taxes, property and equipment lease payments, and other normal operating business expenses; (13) a $1.6 million payment from to the Debtors to Lucent Technologies in commitment fees on credit facilities provided by Lucent; (14) the Debtors' entering into binding contracts by executing purchase orders to acquire $3 million of fast start services to design and construct their wireless network; (15) the Debtors, with the assistance of Lucent Technologies, having begun implementation of the design plans for their network and the purchase of sophisticated equipment for use therein; (16) the employment of Arthur Anderson to perform audit services for the years 1997 and 1998; (17) the Debtors having incurred other post-consummation fees in excess of $150,000 in connection with the preparation of the offering memorandum; and (18) the filing of UCC-1 financial statements with the Secretary of State of Texas on behalf of Lucent Technologies. Before the district court, the FCC did not dispute that these transactions had occurred.

On September 27, 1999, the district court issued a decision, concluding that the Debtors had substantially consummated the plan of reorganization under the Business Alternative[21] and dismissing as equitably moot the FCC's appeal of the confirmation order and part of the FCC's appeal from the avoidance judgment. *See United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 64 (N.D. Tex. 1999). Without identifying the portions of the avoidance appeal that remained before it, the district court held simply that "the court denies the United States' remaining claims with respect to the Avoidance Judgment." *Id.* On September 30, 1999, the district court entered judgment "in accordance with the court's order of September 27, 1999", affirming the bankruptcy court's orders.[22] The FCC timely appealed to this Court.

Discussion

The FCC asserts that the district court erred in three respects: (1) dismissing portions of its appeal under the doctrine of equitable mootness; (2) affirming the bankruptcy court's avoidance judgment, despite its effect on the regulatory authority of the FCC over the licenses; and (3) affirming the bankruptcy court's decision that the subsidiary debtors' and GWI PCS's obligation to the FCC was an avoidable transfer. We

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21 In fact, the bankruptcy court had closed the Debtors' bankruptcy estates in July 1999, finding them to have been fully administered.

22 The Debtors had cross-appealed the confirmation order to the district court, arguing that the bankruptcy court's requiring the Debtors to reserve funds when the FCC's claim was disallowed and determining that the FCC had an impaired claim due solely to the pendency of the appeal of the avoidance judgment were erroneous. *See id.* at 64-65. The district court denied the Debtors' claims, *see id.* at 65, and the Debtors do not renew these contentions on appeal to this Court.

will first address equitable mootness and then turn to the FCC's remaining arguments that are not equitably moot.

I Equitable Mootness

At the outset, the parties disagree as to the standard of review this Court should apply when examining a district court's dismissal of an appeal as equitably moot. The FCC argues that, although the fact findings by the district court should be accepted unless clearly erroneous, the ultimate decision that an appeal is equitably moot remains a legal determination to be reviewed *de novo*. Conversely, the Debtors contend that we should review the district court's dismissal of the FCC's appeal for abuse of discretion-the standard employed by the Third and D.C. Circuits. *In re Continental Airlines*, 91 F.3d 553, 560 (3d Cir. 1996) (*en banc*); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986). In *In re Berryman Products, Inc.*, 159 F.3d 941 (5th Cir. 1998), we affirmed the district court's dismissing as moot a challenge to the confirmation of a reorganization plan of a chapter 11 debtor. *See id.* at 946. We prefaced our discussion of whether the challenge was moot with the following statement regarding our standard of review: "In the bankruptcy appellate process, we perform the same function as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed *de novo*." *Id.* at 943 (footnote omitted); *see In re Manges*, 29 F.3d 1034, 1038-44 (5th Cir. 1994) (undertaking an independent review of the district court's dismissal of the debtors' appeal of the confirmation order).[23] Accordingly, we agree with the

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[23] The Second and Eleventh Circuits have also adopted this standard. *See In re Burger Boys, Inc.*, 94 F.3d 755, 759 (2d Cir. 1996); *In re Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992). *See also In re Western Pac. Airlines, Inc.*, 181 F.3d 1191, 1194

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FCC and will employ this standard in reviewing the district court's ruling on equitable mootness in the case *sub judice* as well.

Equitable mootness "is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." *In re Manges*, 29 F.3d at 1038-39 (citation omitted). "Consequently, a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available-even though there may still be a viable dispute between the parties on appeal." *Id.* at 1039 (citations omitted). When evaluating whether an appeal of a reorganization plan in a bankruptcy case is moot, this Court examines whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan. *See In re U.S. Brass Corp.*, 169 F.3d 957, 959 (5th Cir. 1999) (citing *In re Berryman Prods.*, 159 F.3d at 944; *In re Manges*, 29 F.3d at 1039).[24] We consider each in turn.

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(10th Cir. 1999); *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998) (both reviewing mootness *de novo*).

[24] As we stated in *Manges*:

> "'The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.'" *In re Manges*, 29 F.3d at 1039 (quoting *In re Club Assoc.*, 956 F.2d at 1069).

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A. Failure to Obtain a Stay

The first question in a mootness inquiry is whether the FCC secured a stay to prevent execution of the reorganization plan. "[T]he requirement of a stay encapsulates the fundamental bankruptcy policy of reliance on the finality of confirmation orders by the bankruptcy court." *In re Berryman Prods.*, 159 F.3d at 944 (footnote and citations omitted).[25] Although the FCC secured a temporary stay from the district court on September 10, 1998 and from this Court on September 30, 1998, the stay was lifted on October 7, 1998 and no further stays were effectuated.

The FCC argues that "third parties are well aware of the government's position that licensees such as GWI are not entitled to retain licenses without paying the full amount of the winning auction bid. Investors' knowledge of that position, as well as the pendency of this appeal, appears to have had the same effect as a stay." This contention, however, has no bearing on

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The Eleventh Circuit considers an additional factor-whether the relief sought would affect the reemergence of the debtor as a revitalized entity. *See In re Club Assoc.*, 956 F.2d at 1069 n.11.

[25] The Seventh Circuit has explained that:

"The significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance upon the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision of appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm." *In re UNR Indus.*, 20 F.3d 766, 769-70 (7th Cir. 1994) (quoted in *In re Manges*, 29 F.3d at 1040).

whether a stay has or has not been obtained; rather, this point instructs our determination of whether the reorganization plan has been substantially consummated and the effect on parties not before the court-the second and third factors in our equitable mootness analysis-and cannot serve as a proxy for a judicial stay of the reorganization plan. In the absence of a stay, the reorganization plan became effective and has been implemented since October 7, 1997. This factor therefore militates in favor of dismissal for mootness.

B. Substantial Consummation of the Reorganization Plan

The second consideration in the mootness inquiry is whether the reorganization plan has been substantially consummated. We have adopted the "'substantial consummation' yardstick because it informs our judgment as to when finality concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal." *In re Manges*, 29 F.3d at 1041 (citations omitted). According to 11 U.S.C. § 1101(2):

> "'[S]ubstantial consummation' means-
>
> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan."

The FCC and the Debtors dispute whether the reorganization plan has been substantially consummated. The Debtors reiterate on appeal the numerous transactions completed following the confirmation of the reorganization plan, *see supra* note

20, that persuaded the district court to "conclude[] that the reorganization plan ha[d] been substantially consummated because substantially all of the property proposed by the plan to be transferred has been transferred, Debtors are managing substantially all of the property dealt with by the plan, and distribution under the plan has commenced." *GWI PCS 1, Inc.*, 245 B.R. at 63. Although the FCC does not contest that these transactions have occurred, the FCC maintains that they do not satisfy the "substantially consummated" standard for three reasons: (1) only "insiders", *i.e.*, plan participants, have provided funding for the Debtors in the reorganization and have been paid funds in the reorganization and thus lack a good faith expectation that the FCC's appeal would not be successful; (2) the Debtors have not obtained the $250 million in financing set forth in the reorganization plan and thus have been unable to create a wireless communications system; and (3) the "Litigation Alternative" in the reorganization plan contemplated ongoing litigation between the FCC and the Debtors, thereby not making return of licenses to the FCC and consummation of the plan mutually exclusive. We disagree with the FCC and conclude that the reorganization plan has been substantially consummated.

First, the FCC's argument that only "insiders" have provided financing to the Debtors and have received payments from the Debtors and therefore lack good faith reliance on the reorganization plan, even if true, has never been a consideration in determining whether a reorganization has been substantially consummated. *See In re Continental Airlines*, 91 F.3d at 565 ("While we agree that reliance of the Investors and others on the unstayed Confirmation Order is of central importance to our [equitable mootness] analysis, to focus on the 'reasonableness' of that reliance, at least as measured by the likelihood of reversal on appeal, is necessarily a circular enterprise and therefore of little utility. . . . Our inquiry should not be about the 'reasonableness' of the Investors' reliance or the probability of either party

succeeding on appeal."); *cf. In re Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 734-35 (5th Cir. 1990) (refusing to consider the alleged lack of good faith by a purchaser of debtor property in determining whether an appeal was moot under 11 U.S.C. § 363(m)).[26] Moreover, it would be natural for many, if not a majority, of the transactions set forth in a reorganization plan to involve the participants of the chapter 11 proceedings. Therefore, this argument fails.

Second, the FCC contends that the Debtors have yet to obtain all the financing required under the reorganization plan and have neither constructed nor made operable a personal communications system. The Debtors respond that, although additional financing is required for the completion of the personal communications system, the effectiveness of the reorganization plan does not necessarily depend on obtaining such financing. We agree. Our standard requires only "substantial consummation," not absolute or complete consummation. The Debtors' failure to acquire full financing does not take away from the transactions that have been completed, *see supra* note 20. Accordingly, this argument does not mandate a conclusion that substantial consummation has not been achieved.

Third, the FCC maintains that, despite the transactions that have occurred, the contemplation of the return of the licenses to the FCC in the Litigation Alternative precludes a finding of substantial consummation. As the Debtors point out, however, no steps have been taken towards the Litigation Alternative; instead, it has been eschewed in favor of the Business Alternative with a number of transactions having been completed in furtherance of the Business Alternative.

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[26] This is not to deny the relevance of such matters to the issue of whether or not a stay should be granted in the first place.

More importantly, the reorganization plan's provision of the Litigation Alternative bears more upon the effect of allowing the FCC's appeal to be considered on third parties, not on whether the reorganization plan, as implemented through the Business Alternative, has been substantially consummated. Therefore, we agree with the Debtors and the district court[27] that substantial consummation has been achieved; therefore, this factor weighs in favor of dismissal.

C. Effect on Parties Not Before the Court

The final question in the mootness inquiry involves whether the requested relief would affect the rights of parties not before the court or the success of the reorganization plan. *See In re Berryman Prods., Inc.*, 159 F.3d at 945-46. As we stated in *Manges*, "'[s]ubstantial

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[27] On this point, the district court ruled as follows:

"Although the United States agrees that these transactions have taken place, it does not believe that they constitute substantial consummation. The court disagrees. Upon review of the pleadings filed and the appellate record, the court concludes that the reorganization plan has been substantially consummated because substantially all of the property proposed by the plan to be transferred has been transferred, [the] Debtors are managing substantially all of the property dealt with by the plan, and distribution under the plan has commenced. The United States also disputes substantial consummation because the Litigation Alternative exists as a part of the confirmed reorganization plan. Again, the court disagrees. As discussed above, the court concludes that substantial consummation of the plan, by way of the Business Alternative, has already taken place irrespective of the possibility of implementation of the Litigation Alternative whereby the licenses would be returned to the FCC, and litigation for the benefit of the creditors and equity would be initiated to attempt to recover the payments made by [the] Debtors to the FCC. Accordingly, the second factor also weighs in favor of dismissal of the appeal as moot." *GWI PCS 1, Inc.*, 245 B.R. at 63-64.

consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief.'" *In re Manges*, 29 F.3d at 1042-43 (quoting *In re Chateaugay* Corp., 10 F.3d 944, 952 (2d Cir. 1993)) (alteration in original). Here, we must evaluate the transactions that have occurred under the reorganization plan against the backdrop of the relief sought by the FCC-reinstatement of the full $954 obligation under the notes and bid price and the increased risk of revocation of the licenses for failure to satisfy the increased obligation. Despite the inclusion of the Litigation Alternative in the reorganization plan, it remains obvious that saddling the subsidiary debtors with an additional $894 million obligation would have a detrimental affect on the post-bankruptcy investors and entities and on the success of the Business Alternative, which was the route preferred by the majority of the bankruptcy participants in resolving the Debtors' chapter 11 petition. In sum, it appears quite unlikely that we could place the Debtors' estates or the third parties back into the status quo as it existed before the avoidance judgment if we were to unravel this important and fundamental aspect of the reorganization plan at this time. Therefore, we conclude that this factor also weighs heavily in favor of mooting the FCC's appeal.[28]

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[28] In its consideration of this factor, the district court stated as follows:

"[T]he court must determine whether the granting of relief on appeal would affect the rights of third parties not before the court or the success of the plan. Upon review of the pleadings filed and the appellate record, the court concludes that the granting of the relief which the United States seeks on appeal would affect the rights of third parties not before the court and the success of the plan. The various investors and entities which have consummated transactions with Debtors since the entry of the Confirmation Order, and the confirmation plan itself, would

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D. Application of Equitable Mootness to the FCC's Arguments

As all three factors weigh in favor of the district court's dismissal of part of the FCC's appeal, we hold that the district court properly granted the Debtors' motion to dismiss. Having concluded that equitable mootness applies, we now turn to what it applies to. As the FCC properly concedes that its challenge to the authority of the bankruptcy court to permit the subsidiary debtors to retain the licenses and the subsidiary debtors and GWI PCS to avoid $894 million of the subsidiary debtors' and GWI PCS's obligation to pay the full bid price for the licenses, does not amount to a contention that the bankruptcy court actually lacked *jurisdiction,* as such, to enter any portion or portions of the complained of orders,[29] we hold this challenge is

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be detrimentally affected if [the] Debtors were suddenly obligated to the FCC for an additional $900 million. The third factor, therefore, weighs in favor of dismissal of the appeal as moot." *GWI PCS 1, Inc.*, 245 B.R. at 64.

[29] The bankruptcy court's enjoining the FCC from revoking the licenses and avoiding the majority of the obligations under the notes was within its jurisdiction to preserve property of the estate, *see* 11 U.S.C. § 541, and further the reorganization plan. In addition, 11 U.S.C. § 106 renders the United States and the FCC subject to the bankruptcy proceedings. Section 106 states as follows:

"(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

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(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate." 11 U.S.C. § 106.

Moreover, 28 U.S.C. § 1334(b), which provides district courts with jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases filed under title 11, "[n]otwithstanding

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equitably moot. Although the bankruptcy court possibly *erred* in permitting avoidance and enjoining the FCC from revoking the subsidiary debtors' licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC, the FCC's challenge on this point and request that the avoidance judgment, in its entirety, and the enjoinment order, be reversed are barred by equitable mootness.

The Second Circuit's decision, *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (*per curiam*), *cert. denied*, No. 99-1980 (U.S. Oct. 10, 2000), although casting doubt on the merits of the bankruptcy court's assuming a quasi-regulatory role, does not dissuade us from ruling that the FCC's challenge on this issue is equitably moot. NextWave Personal Communications, Inc. (NextWave), like GWI PCS, was the high bidder for C-block licenses at the FCC's 1995-96 C-block auction. *See id.* at 46. Similar to nearly all winning bidders for C-block licenses, NextWave experienced financial difficulties and on June 8, 1998 "filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses." *Id.* at 48. The bankruptcy court granted NextWave's relief in the adversary proceeding, finding that the transaction in which it had acquired the licenses was a fraudulent transfer subject to avoidance. *See id.* at 50. Accordingly, the bankruptcy court reduced NextWave's obligation to the FCC from

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any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts," and 28 U.S.C. § 157 grant the bankruptcy court jurisdiction to consider the Debtors' avoidance claims.

$4.74 billion to $1.02 billion.[30] *See id.* The Second Circuit reversed the bankruptcy court's avoidance judgment, concluding that the bankruptcy court improperly "exercised the FCC's radio-licensing function." *Id.* at 55. In contrast to the present case where the district court dismissed this claim by the FCC as equitably moot, the district court in *NextWave* had "affirmed [the avoidance judgment] for substantially the reasons stated by the bankruptcy court." *Id.* at 50 (citing *In re NextWave Personal Communications, Inc.*, 241 B.R. 311 (S.D.N.Y. 1999)). The district court in *NextWave* did not find the FCC's appeal to be equitably moot, nor did the Second Circuit consider that issue. In fact, the FCC had successfully obtained a stay in *NextWave* and NextWave did not have a confirmed reorganization plan to consummate. Accordingly, mootness was not at issue. Therefore, although the Second Circuit's decision supports the FCC's substantive merits argument, it does not prevent the FCC's challenge on this issue from being equitably moot.[31]

The reorganization order, however, preserved certain challenges to the valuation of the licenses and the amount of a the FCC's claim against the Debtors. In

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[30] As in the present case, the bankruptcy court valued the licenses as of the date the notes securing NextWave's obligation were executed, not on the closing date of the C-block auction. *See id.* at 49-50. The bankruptcy court also credited NextWave with its $474 million in down-payments, leaving approximately $549 million in payment left to be made to the FCC. *See id.* at 50.

[31] Indeed, if the issue were not equitably moot, we might agree with the Second Circuit and reverse the bankruptcy court's avoidance judgment. However, that is not the case before us, and we need not and do not decide the matter. We observe that no party has urged before us the applicability, or otherwise, of 11 U.S.C. § 362(b)(4), or indeed even cited that section to us.

light of the results of the March 1999 reauction of C-block licenses, *see supra* note 18, the remedy now available to the FCC is necessarily limited to an unsecured claim for any amount the FCC's claim is determined on appeal to be in excess of the average winning bid at the March 1999 C-block reauction, *see supra* notes 17 and 18. At oral argument, counsel for the Debtors conceded that the reorganization plan preserved two grounds for the FCC to appeal: (1) the valuation of the licenses as of January 27, 1997; and (2) when the subsidiary debtors' and GWI PCS's obligation to the FCC arose. These challenges can not result in the revocation of the licenses, but rather only in the recoupment of more money by the FCC as an unsecured claim. We now turn to the FCC's contention that the bankruptcy court erred in avoiding $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC, keeping in mind that the avoidance judgment cannot now be vacated and the only remedy available to the FCC is an unsecured claim (payable only out of the $18 million Unsecured Creditors' Fund, see notes 17 and 18, *supra*).

II The Avoidance Judgment

The bankruptcy court avoided approximately $894 million of the subsidiary debtors' and GWI PCS's obligation to the FCC as a constructive fraudulent transfer under 11 U.S.C. § 548(a)(2) (1996).[32] The elements of a claim of constructive fraud under section 548(a)(2) are that: (1) the debtor transferred an interest in property; (2) the transfer of that interest occurred within one year prior to the filing of the bankruptcy petition; (3) the debtor was insolvent on the date of the transfer or became insolvent as a result thereof; and (4) the debtor received less than reasonably equivalent value in exchange for such transfer. *See In re McConnell*, 934

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[32] See note 11, *supra*.

F.2d 662, 664 (5th Cir. 1991); *see also In re XYZ Options, Inc.*, 154 F.3d 1262, 1275 (11th Cir. 1998); *Butler v. Lomas and Nettleton Co.*, 862 F.2d 1015, 1017 (3d Cir. 1988); *cf. Burroughs v. Fields*, 546 F.2d 215, 218 (7th Cir. 1976) (interpreting 11 U.S.C. § 107, the predecessor to 11 U.S.C. § 548). The FCC does not appeal the bankruptcy court's valuation of the licenses as of January 27, 1997, or March 14, 1997, nor does the FCC contend that the subsidiary debtors or GWI PCS were solvent as of January 27, 1997 or March 14, 1997. Therefore, any such arguments have been waived. However, the FCC does contest the bankruptcy court's decision to choose January 27, 1997 (or March 14, 1997) as the appropriate date for the avoidance inquiry. The Debtors bear the burden of establishing the date the transfer occurred. *See In re McConnell*, 934 F.2d at 665 n.1; *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). The bankruptcy court's determination on this issue involves a mixed question of law and fact, which we review *de novo* (although findings of historic facts are accepted unless clearly erroneous). *See In re Southmark Corp.*, 62 F.3d 104, 106 (5th Cir. 1995) (citing *Barnhill v. Johnson*, 112 S.Ct. 1386, 1389 (1992)).

The date on which the payment obligation arose is crucial to whether this obligation is avoidable. First, if the subsidiary debtors and GWI PCS incurred the obligation at the close of the auction, May 8, 1996, then the value of the fourteen licenses would be $1.06 billion. And if the fair market value were $1.06 billion, then the consummation of the notes would not be a constructive fraudulent transfer. On the other hand, if their obligation first arose on or about the date on which the licenses were conditionally granted, January 27, 1997, or on March 14, 1997, then the $954 million obligation represented by the notes substantially exceeded the fair market value of the licenses. Second, if the obligation arose on May 8, 1996, then it would not have been incurred within one year of the filing of the Debtors' bankruptcy petitions and would therefore not have been

avoidable. In support of its position that the obligation arose on the date the C-block auction closed, the FCC relies on the following: (1) its own interpretation of its regulations; (2) auction law principles; and (3) the Second Circuit's *NextWave* decision, which relies on (1) and (2). In response, the subsidiary debtors and GWI PCS assert that the FCC's interpretation does not warrant deference and that the bankruptcy court correctly fixed January 27, 1997 as the appropriate date, because the FCC's own regulations provide that the licenses were not transferred and the full bid price incurred until January 27, 1997. We conclude that the bankruptcy court did not err in evaluating the transfer as of January 27, 1997.

We first address the FCC's argument that this Court should defer to the FCC's formal interpretation that under its regulations the binding obligation to pay the full bid price attaches "upon the acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses*, 14 F.C.C.R. 1126 ¶ 1, 1998 WL 889489 (Dec. 23, 1998); *see In re C.H. PCS, Inc.*, 14 F.C.C.R. 4131 ¶ 3, 1999 WL 24950 (Jan. 22, 1999) ("[U]nder the Commission's rules, a winning bidder is obligated to pay the full amount of its winning bid . . ."). Accordingly, under this interpretation, the obligation was incurred, in the present case, on May 8, 1996. In *NextWave*, the Second Circuit afforded this interpretation considerable deference in ruling that NextWave's obligation arose at the close of the C-block auction, despite NextWave's contention that the FCC's status as a creditor and its self-interest precluded the court's deferring to the FCC's interpretation. *See In re NextWave*, 200 F.3d at 57 ("Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference . . ."); *id.* at 59 ("The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.").

We respectfully disagree with the Second Circuit's conclusion that courts should defer to the FCC's interpretation in this matter. The FCC did not announce its interpretation until December 23, 1998-nearly two years after C-block licensees began experiencing financial difficulties and after the Debtors had filed bankruptcy petitions, brought an adversary proceeding against the FCC, and obtained a judgment in the adversary proceeding on June 4, 1998.[33] Moreover, in a separate statement issued with the December 23, 1998 order, FCC Chairman William Kennard wrote that "some of the[] issues [addressed in this order] only emerge[d] as a result of the lessons learned during litigation." *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses*, Statement of Chairman William Kennard, 14 F.C.C.R. 1126, 1998 WL 889489 (Dec. 23, 1998). In fact, paragraph one of the December 23, 1998 order, which contains the interpretation the FCC argues that this Court should defer to, states that the newly adopted procedures for transferring licenses "was made in light of a recent bankruptcy court decision and arguments raised in other pending bankruptcy proceedings." *Id.* ¶ 1 (footnote omitted). This bankruptcy decision and proceedings, as noted in the margin of the order, were those of the lower courts in this dispute between the Debtors and the FCC. *See id.* ¶ 1 n.3 (containing the following citation: "*See, e.g., In re GWI PCS 1, Inc., et al.*, Case Nos. 39739676 through 39739689 (Bankr. N.D. Tex.); *GWI PCS 1, Inc. v. FCC*, Adv. No. 397-3492 (Bankr. N.D. Tex.) (appeal pending)"). In circumstances such as these, where an agency's

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33 The present litigation was not the only one pending in December 1998 that raised the issue of avoidance; for example, NextWave filed its chapter 11 petition and instituted its adversary proceeding against the FCC on June 8, 1998. *See In re NextWave*, 200 F.3d at 48.

interpretation occurs at such a time and in such a manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation. *See Waste Control Specialists v. United States Dept. of Energy*, 141 F.3d 564, 567 (5th Cir. 1998) ("We will not give deference to [the Department of Energy]'s interpretation . . . , because it had not enunciated its interpretation prior to the litigation.") (footnote and citations omitted); *United States v. Food, 2,998 Cases*, 64 F.3d 984, 987 n.5 (5th Cir. 1995) ("Because it appears that the FDA interpreted § 334 and § 381 at such a time and in such a manner so as to provide a convenient litigation position for this suit, we disagree and conclude that the FDA's position is not controlling.") (citation omitted); *Irving Indep. Sch. Dist. v. Packard Properties*, 970 F.2d 58, 64 (5th Cir. 1992) ("Discounting the FDIC interpretation is appropriate for another important reason. The FDIC's Legal Memorandum was issued during pending litigation."); *see also Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 474 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984) ("To carry much weight, however, the [agency] interpretation must be publicly articulated some time prior to the agency's embroilment in litigation over the disputed provision."). Accordingly, we do not afford the FCC's December 1998 interpretation deference in determining the appropriate date on which the subsidiary debtors' and GWI PCS's obligation to the FCC arose.

We now consider the FCC's argument that auction law supports its position that the transfer must be evaluated at the date the C-block auction closed-May 8, 1996. General principles of auction law provide a baseline rule that the close of an auction-the fall of the hammer-signals acceptance of the offer and creates a binding contract between the seller and the high bidder. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall.) 196, 206 (1865) ("[A]s soon as the hammer is struck down . . . the

bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract.") (footnote and citations omitted); *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376, 378-79 (6th Cir. 1991) ("'The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of a hammer.'") (quoting 7 Am. Jur. 2d *Auctions & Auctioneers* § 16 (1980 & Supp. 1991)); *Bottorff v. Ault*, 374 F.2d 832, 835 (7th Cir. 1967) ("The sales here were at auction. They were completed when the hammer fell or when the auctioneer said 'sold.'") (citation omitted); *United States v. Conrad*, 619 F. Supp. 1319, 1321 (M.D. Fla. 1985) ("It has long been settled that a bid constitutes an offer and the fall of the hammer signifies acceptance."). This postulate of auction law, however, merely provides a baseline, which, in the context of the FCC's auction of the electromagnetic spectrum, has been modified by the FCC's regulations. In *NextWave*, the Second Circuit agreed with the FCC's interpretation of the bidding regulations, concluding that at the close of a C-block auction a winning bidder "became obligated, if qualified, to pay the . . . bid price or, if unqualified, to pay a prescribed penalty." *In re NextWave*, 200 F.3d at 58. The Second Circuit then reasoned that, "[b]y making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the amount of any shortfall in a re-auction of the same Licenses." *Id.* at 61. Thus, the Second Circuit determined that NextWave became obligated to pay the FCC the full bid price at the close of the auction. We respectfully disagree with the Second Circuit's conclusion in this respect.

Neither the FCA nor FCC regulations states that the high bidder for a C-block license becomes obligated for the full amount of the bid at the close of the auction. Instead, 47 C.F.R. § 24.704 provides as follows:

"(a) When the Commission conducts a simultaneous multiple round auction pursuant to § 24.702(a)(1), the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder was [sic] deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (a)(1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission." 47 C.F.R. § 24.704(a) (1995).[34]

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[34] This regulation governing the auction of the electromagnetic spectrum comports with the FCC's general competitive bidding

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This penalty provision does not obligate the winning bidder to pay the full amount of the bid. Accordingly, by making the winning bids on the fourteen licenses, GWI PCS only obligated itself to pay a penalty in the event of default or disqualification, not the full amount of the winning bids.[35] There has been no default respecting the

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procedures contained in 47 C.F.R. §§ 1.2104(g) & 1.2109(c) (1995).

[35] The FCC's treatment of a defaulting entity further supports this conclusion. *See In re BDPCS, Inc.*, 11 F.C.C.R. 14,399, 1996 WL 625565 (Oct. 25, 1996). BDPCS was a high bidder for seventeen C-block licenses, but "fail[ed] to remit the required down payment on the licenses for which it was the successful high bidder." *Id.* ¶ 1. On May 30, 1996, the FCC publicly announced that BDPCS had defaulted on the seventeen licenses and that these licenses would be reauctioned in July 1996. *See id.* ¶ 4. With regard to BDPCS's obligation to the FCC, the October 25, 1996 order states as follows:

> "A defaulting bidder is subject to certain default payment obligations. Specifically, such bidder is required to pay the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission (so long as the subsequent winning bid is less than the amount bid), plus an additional payment equal to three percent of the defaulter's bid or the subsequent winning bid, whichever is less. In the event that a license is reauctioned for amount greater than or equal to the defaulted bid, the total default payment is equal to three percent of the defaulted bid. In the event that the default payment cannot be determined (i.e, because a license has not yet been reauctioned), the Commission has indicated that a deposit may be assessed of up to 20 percent of the defaulted bid price. Finally, the Commission's payment rules provide that if a defaulting bidder does not submit the default payment assessed by the Commission in the time required, any amounts overdue 'will be deducted from any upfront payments or down payments that the

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fourteen licenses for which GWI PCS was the high bidder. No penalty therefore has been assessed or can be calculated.[36]

After the close of the auction on May 8, 1996, GWI PCS was merely entitled to apply for the licenses. To be sure, GWI PCS held a contingent right to the fourteen licenses; however, the FCC's January 27, 1997 order makes clear that the transfer of the licenses was not complete until the execution of the notes and the payment of the remaining portion of the down-payment. *See Wireless Telecommunications Bureau Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block Licenses to GWI PCS Inc.*, 12 F.C.C.R. 1215, 1997 WL 28957 (Jan. 27, 1997) ("GWI PCS will receive its individual BTA licenses following payment for each license of the final down payment and execution and return of the note and security agreement."); *id.* ("[T]he Bureau . . . granted GWI PCS's applications, conditioned on timely payment of its remaining down payment obligation.").[37] GWI PCS's applications remained subject to objection by the public (and in fact were objected to) and could have been rejected by the FCC-a decision affording the FCC some

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defaulting or disqualified bidder has deposited with the Commission.'" *Id.* ¶ 5 (footnotes omitted).

Notably, this order does not state that BDPCS is, or was ever, obligated to the FCC for the full amount of its bid price.

[36] In fact, the subsidiary debtors assert that, since the bankruptcy court confirmed the reorganization plan, they have made over $9 million in installment payments to the FCC under the modified obligation to the FCC-a contention the FCC does not dispute.

[37] In addition, interest on the bid amount did not begin to accrue until the conditional granting of the licenses. *See* 47 C.F.R. § 24.711(b)(1) (1995); 47 C.F.R. § 1.2110(e)(3)(i) (1995).

level of discretion. *See* 47 C.F.R. § 24.832(a) (1995) ("Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, *the Commission finds that the grant will serve the public interest, convenience and necessity.*") (emphasis added); 47 C.F.R. § 24.804(a) (1995) ("Authorizations will be granted upon proper application if: (1) The applicant is qualified under all applicable laws and Commission regulations, policies and decisions; (2) There are frequencies available to provide satisfactory service; and (3) *The public interest, convenience or necessity would be served by a grant.*") (emphasis added); *see also* 47 C.F.R. § 1.2108(d)(1) (1995) ("If the Commission determines that: (1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application."); *In re Implementation of Section 309(j) of the Communications Act-Competitive Bidding, Fifth Report and Order*, 9 F.C.C.R. 5532 ¶ 81, 1994 WL 372170 (July 15, 1994) ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.").[38] In addition, it is undisputed that while the applications were pending, GWI PCS could not and did not use the licenses. *See* 47

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[38] The FCC also has the authority to amend the terms for awarding a license after an application for the license has been filed. *See PLMRS Narrowband Corp v. FCC*, 182 F.3d 995, 1000-01 (D.C. Cir. 1999) (concluding that the FCC's decision to auction licenses and return all pending applications, which had been submitted when the licenses were awarded by a lottery system, was not arbitrary and capricious); *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1402-03 (D.C. Cir. 1995) (upholding the FCC's authority to impose a payment requirement for a license, where the potential licensee applied for the license before the FCC required any payment).

C.F.R. § 24.803 (1995) ("No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part."). Only after the applications were approved and the promissory notes had been signed, could the fruits of the licenses be utilized.[39] Accordingly, the C-block auction was not a

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[39] The FCC regulations, however, do provide for the temporary use of a license with FCC permission. 47 C.F.R. § 24.825 provides as follows:

> "(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in § 24.805 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, at least 10 days prior to the expiration date of the existing temporary authorization. The Commission may accept a late-filed request upon due showing of sufficient reasons for the delay in submitting such request.
>
> (b) Special temporary authorizations may be granted without regard to the 30- day public notice requirements of § 24.827(b) when:
>
> (1) The authorization is for a period not to exceed 30 days and no application for regular operation is contemplated to be filed;
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> (2) The authorization is for a period not to exceed 60 days pending the filing of an application for such regular operation;
>
> (3) The authorization is to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

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typical auction. Under the C-block auction rules, the winning bidder is not entitled to the license until after receiving subsequent FCC approval and does not become obligated for the full bid price until the notes securing the full bid price are thereafter signed.

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(4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(c) Temporary authorizations of operation not to exceed 180 days may be granted under the standards of Section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted, but the applicant bears a heavy burden to show that extraordinary circumstances warrant such an extension.

(d) In cases of emergency found by the Commission, involving danger to life or property or due to damage of equipment, or during a national emergency proclaimed by the president or declared by the Congress or during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or safety or otherwise in furtherance of the war effort, or in cases of emergency where the Commission finds that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission will grant radio station authorizations and station licenses, or modifications or renewals thereof, during the emergency found by the Commission or during the continuance of any such national emergency or war, as special temporary licenses, only for the period of emergency or war requiring such action, without the filing of formal applications." 47 C.F.R. § 24.825 (1995).

We hold that the possibility of an FCC temporary grant of use of the license does not render the grant of a license to a high bidder unconditional.

The transfer of subsidiary debtors' fourteen licenses and the concurrent obligation to pay the remaining bid price, $954 million, did not arise until the subsidiary debtors executed the promissory notes for the remainder of the bid price on January 27, 1996. *See In re Southmark Corp.*, 62 F.3d at 106 ("A debtor incurs a debt when he becomes legally obligated to pay it.") (citing *Sherman v. First City Bank (In re United Sciences of Am.)*, 893 F.2d 720, 724 (5th Cir. 1990); *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983)). Therefore, we conclude that the bankruptcy court properly determined January 27, 1997 as the appropriate date to evaluate the avoidance motion. With respect to this issue, the FCC's challenge fails, and we affirm the avoidance of the approximately $894 million of the obligation of the subsidiary debtors (and of any such obligation of GWI PCS) to the FCC.

Conclusion

For the reasons stated, the judgment of the district court is AFFIRMED.